

REDACTED, PUBLIC VERSION

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
TCR Sports Broadcasting Holding, L.L.P.)	MB Docket No. 08-214
d/b/a Mid-Atlantic Sports Network,)	
)	
Complainant)	
)	File No. CSR-8001-P
v.)	
)	
Comcast Corporation,)	
)	
Defendant)	

To: Marlene H. Dortch, Secretary

Attn: Hon. Richard L. Sippel
Chief Administrative Law Judge

PROPOSED RECOMMENDED DECISION

Issued: _____

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July 20, 2009

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BACKGROUND

1. This case involves a program-carriage complaint filed by TCR Sports Broadcasting Holding, L.L.P. (“TCR”), d/b/a the Mid-Atlantic Sports Network (“MASN”), against Comcast Corporation (“Comcast”).¹ MASN alleges that Comcast violated Section 616 of the Communications Act of 1934,² and the Commission’s program-carriage rules,³ by engaging in affiliation-based discrimination against MASN in favor of Comcast’s affiliated regional sports networks (“RSNs”), Comcast SportsNet Mid-Atlantic (“CSN-MA”) and Comcast SportsNet Philadelphia (“CSN-Philly”). The Complaint alleges that Comcast discriminated against MASN by denying it carriage in numerous areas across its geographic footprint, but principally in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities Designated Marketing Areas (“DMAs”). These areas are referred to collectively here as the “Foreclosed Areas.”

2. On October 10, 2008, the Media Bureau issued a *Hearing Designation Order*. The Media Bureau concluded that MASN had established a *prima facie* case of discrimination, and designated certain issues to this Tribunal for resolution.⁴ By agreement of the parties and by various orders, schedules were established for discovery, including document production, depositions, and production of expert witness reports, and for pre-trial briefs. Following the completion of discovery and the submission of trial briefs, written direct testimony, and proposed trial exhibits, the hearing was held from May 18 to May 26, 2009. After conclusion of the hearing, the parties submitted proposed findings of fact and conclusions of law, proposed reply findings of fact and conclusions of law, a joint glossary of terms, and proposed recommended decisions. The Enforcement Bureau also submitted post-hearing comments.

¹ See Carriage Agreement Complaint, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, MB Docket No. 08-214, CSR-8001-P (FCC filed July 1, 2008) (“Carriage Complaint” or “Complaint”).

² See 47 U.S.C. § 536(a)(3). Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (“Cable Act”). Subsection (a)(3) directs the Commission to promulgate regulations “designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.” 47 U.S.C. § 536(a)(3). Pursuant to that directive, the Commission promulgated 47 C.F.R. § 76.1301(c).

³ See 47 C.F.R. § 76.1301(c).

⁴ See Memorandum Opinion and Hearing Designation Order, *Herring Broadcasting, Inc. v. Time Warner Cable Inc.*, 23 FCC Rcd 14787 (MB 2008) (“*Hearing Designation Order*” or “*HDO*”).

ARGUMENTS

Complainant

3. MASN contends that, under Section 616 of the Communications Act and Section 76.1301(c) of the Commission's regulations, it carries the burden of establishing a *prima facie* case of discrimination on the basis of affiliation or nonaffiliation. Once it establishes a *prima facie* case, the burden then shifts to Comcast to prove that any disparate treatment was the product of legitimate, non-discriminatory reasons and not based on affiliation or nonaffiliation. MASN contends that the *HDO* constitutes a finding that it made out a *prima facie* case and that, in any event, MASN established a *prima facie* case of discrimination at the hearing. Among other things, MASN points to the fact that only 87 percent of Comcast subscribers receive MASN, while virtually 100 percent of Comcast subscribers receive a Comcast-affiliated RSN, specifically, CSN-MA, CSN-Philly, or both.⁵ MASN further contends that the ultimate legal standard is irrelevant in this proceeding because the evidence is sufficient to show affiliation-based discrimination under any legal standard.

4. MASN also argues that Comcast's conduct had the effect of "unreasonably restrain[ing]" its "ability . . . to compete fairly."⁶ MASN argues that depriving an unaffiliated programming network of the ability to compete for carriage on a level playing field with affiliated video programming networks constitutes an unreasonable restraint on its ability to compete fairly. MASN argues that it has submitted evidence showing a concrete competitive impact on MASN in at least four respects.

5. MASN contends that the proper remedy for Comcast's discriminatory conduct is mandatory carriage of MASN by Comcast in each of the disputed regions on the same terms and conditions that other major multi-channel video program distributors ("MVPDs") carry MASN in these regions.

Defendant

6. Comcast contends that MASN has failed to bear its burden to prove that it discriminated against MASN on the basis of affiliation or nonaffiliation. Comcast contends that the 2006 Carriage Agreement, which resolved MASN's previous carriage complaint against Comcast, precludes MASN from bringing this action. Comcast further contends that by denying MASN carriage on the disputed systems in 2007 and 2008, it relied on the 2006 Carriage Agreement, and also determined that carriage of MASN was unjustified because of the network's bandwidth requirements, high cost, and low demand.

⁵ See MASN Ex. 70 (Comcast prepared list of subscribers); Tr. at 6503-04 ("Q: Thank you. So am I correct in stating that from this MASN Exhibit No. 70 very close to 100 percent of all Comcast systems carry CSN Philly or CSN MA? A: One or the other. Q: Yes. A: Yes. Q: Very close to 100 percent? A: Yes.") (Ortman Test.).

⁶ 47 U.S.C. § 536(a)(3).

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7. Comcast also contends that it did not unreasonably restrain MASN's ability to compete fairly. Comcast argues that any harm MASN suffered was self-inflicted by MASN's acceptance of the 2006 Carriage Agreement, and therefore cannot be deemed "unreasonable." Comcast further contends that even without 100 percent carriage, MASN is profitable and enjoys carriage on numerous other video programming distributors.

8. Comcast contends that, even if it discriminated against MASN on the basis of affiliation or nonaffiliation, carriage on a sports-tier is the appropriate remedy.

WITNESSES

Complainant's Witnesses

9. MASN produced three fact witnesses at the hearing: James Cuddihy, Executive Vice President of MASN; Mark Wyche, with Bortz Media, an outside consultant for MASN; and David Gluck, another outside consultant for MASN. Both Messrs. Wyche and Gluck were involved in the carriage negotiations between MASN and Comcast. MASN also produced Mr. Wyche as an expert witness on the subjects of discrimination and the fair market value of MASN. Dr. Hal Singer also testified at the hearing as an economic expert for MASN.

Defendant's Witnesses

10. Comcast produced two fact witnesses at the hearing: Madison ("Matt") Bond, the Executive Vice President of Content Acquisition for Comcast Cable, and Michael Ortman, the Vice President of Programming for the Eastern Division of Comcast Cable.⁷ Comcast also presented two expert witnesses: Larry Gerbrandt, a media consultant, and Jonathan Orszag, an economist.

FINDINGS OF FACT

The Parties and Their Affiliations

11. MASN is a video programming vendor within the meaning of the Commission's program-carriage rules.⁸ MASN is an independent RSN. MASN is not "affiliated" with Comcast within the meaning of the program-carriage rules.⁹

12. MASN's primary programming involves the games of the Baltimore Orioles and the Washington Nationals, which are both Major League Baseball ("MLB") teams.¹⁰

⁷ See Comcast Ex. 2, ¶¶ 1, 2 (Ortman Written Test.).

⁸ See 47 C.F.R. § 76.1300(e).

⁹ See *id.* § 76.1300(a) & (b).

¹⁰ See Comcast Ex. 1, ¶ 4 ("MASN is an RSN principally offering [MLB] games of the Baltimore Orioles and the Washington Nationals.") (Bond Written Test.).

13. MASN's geographic footprint includes the entire states of Virginia, Maryland, Delaware, the District of Columbia, certain parts of southern Pennsylvania and eastern West Virginia, and a substantial part of North Carolina.¹¹ This footprint is identical to the television territory of the Orioles. The Nationals also share the same television territory as the Orioles.¹²

14. Defendant Comcast Corporation is a vertically integrated MVPD, and the largest MVPD in the United States.¹³ Comcast has an ownership interest in approximately 20 programming networks, including RSNs.¹⁴ Among other RSNs, Comcast owns CSN-MA and CSN-Philly. CSN-MA's primary sports programming involves the Washington Wizards, a National Basketball Association ("NBA") team, and the Washington Capitals, a National Hockey League ("NHL") team.¹⁵ CSN-Philly's primary programming involves the Philadelphia Phillies, a MLB team, the Philadelphia Flyers, a NHL team (which Comcast owns), and the Philadelphia 76ers, a NBA team (which Comcast owns).¹⁶

15. Comcast serves more subscribers in MASN's geographic footprint than any other MVPD.¹⁷ MASN's geographic footprint overlaps with the geographic footprints of both CSN-MA and CSN-Philly.¹⁸ Over MASN's geographic footprint, Comcast has more than [REDACTED] million expanded basis subscribers.¹⁹

¹¹ See MASN Ex. 237, ¶ 3 (Gluck Written Test.); see MASN Ex. 239 (map of MASN's territory).

¹² See MASN Ex. 236, ¶ 5 (Wyche Written Test.).

¹³ See Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc.; Adelphia Communications Corp. to Comcast Corp.; Comcast Corp. to Time Warner Inc.; Time Warner Inc. to Comcast Corp.*, 21 FCC Rcd 8203, ¶ 7 (2006) ("Adelphia Order").

¹⁴ See *id.* ¶ 8 & nn.31-32; MASN Ex. 134; MASN Ex. 137.

¹⁵ See Comcast Ex. 2, ¶ 4 (Ortman Written Test.).

¹⁶ See Answer of Comcast Corporation at 47, ¶ 64 (filed July 31, 2008) (admitting "that CSN-Philadelphia telecasts the games of major professional sports teams, including the Philadelphia Phillies baseball team"); *id.* at 48, ¶ 74 (admitting "that CSN-[Philly] has the rights to televise certain Philadelphia Flyers (NHL) and Philadelphia 76ers (NBA) games"); see also MASN Ex. 22 (Comcast "has a majority ownership in Comcast-Spectator, whose major holdings include the Philadelphia Flyers NHL hockey team [and] the Philadelphia 76ers NBA basketball team.").

¹⁷ See Comcast Ex. 85, at 85-8 (MASN internal chart projecting subscriber numbers).

¹⁸ See MASN Ex. 70 (attachment to Comcast's expert report showing cable systems in the territories of MASN, CSN-MA, and CSN-Philly).

¹⁹ See, e.g., Comcast Ex. 85, at 85-8 (MASN internal chart projecting subscriber numbers).

Background of Carriage Dispute

16. MASN has telecast Nationals games since the beginning of the 2005 MLB season. MASN has telecast both Nationals and Orioles games since the beginning of the 2007 MLB season.²⁰ Consistent with industry standards, MASN charges MVPDs a certain license fee per subscriber per month. MASN has divided its geographic footprint into six regions, and offers different license fees among these regions.²¹

17. Beginning in at least March 2005, MASN attempted to obtain carriage from Comcast.²² MASN sent a proposed term sheet to Comcast seeking carriage on all systems within MASN's geographic footprint. Comcast's lead negotiator during carriage discussions with MASN was Mr. Bond.²³ On April 14, 2005, MASN representatives travelled to Philadelphia to meet with Mr. Bond and other Comcast officials about carriage, but no agreement was reached.²⁴

18. In May 2005, MASN reached an agreement with DirecTV to carry MASN across MASN's geographic footprint.²⁵ That agreement came after two months of negotiations.²⁶ DirecTV vigorously negotiated the terms of this agreement with respect to every region within MASN's footprint.²⁷ During these negotiations, DirecTV made clear that it would not carry MASN in regions where the demand was too low to justify the price charged by MASN.²⁸ Since then, MASN reached carriage agreements with the other major MVPDs within MASN's footprint, including DISH, Charter, Cox, and Verizon.²⁹ MASN currently has carriage agreements with more than 20 MVPDs throughout its footprint.³⁰

19. In June 2005, MASN filed a carriage complaint against Comcast pursuant to the Cable Act and the Commission's rules.³¹ MASN alleged that "Comcast has unreasonably

²⁰ See Tr. at 6032 ("We had exclusive rights to televise [the] Orioles and the Nationals. But when we first launched in '05, when first MASN launched in '05, we only had the Nationals for the first two years.") (Wyche Test.).

²¹ E.g., MASN Ex. 238, ¶ 52, Table 1 (Singer Written Test.).

²² See MASN Ex. 237, ¶ 11 (Gluck Written Test.).

²³ See Tr. at 6732-33 (Bond Test.).

²⁴ See MASN Ex. 237, ¶ 12 (Gluck Written Test.).

²⁵ See MASN Ex. 237, ¶ 4 (Gluck Written Test.).

²⁶ See Tr. at 6045 (Gluck Test.).

²⁷ See Tr. at 6047-48 (Gluck Test.).

²⁸ See MASN Ex. 237, ¶ 6 (Gluck Written Test.).

²⁹ See MASN Ex. 237, ¶ 4 (Gluck Written Test.).

³⁰ See MASN Ex. 237, ¶ 4 (Gluck Written Test.).

³¹ See Carriage Agreement Complaint, *TCR Sports Broadcasting Holdings, L.L.P. v. Comcast Corp.*, MB Docket No. 06-148, CSR-6911-N (FCC filed June 14, 2005) ("2005 Carriage Complaint").

restrained the ability of [MASN] to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors.”³²

20. In July 2006, the Commission issued two orders that pertained to this carriage dispute. *First*, on July 21, 2006, the Commission approved a transaction (that had been requested in May 2005) for Comcast and Time Warner Cable (“TWC”) to acquire the cable assets of Adelphia Communications Corp. (“Adelphia”) and to swap certain assets between them.³³ But the Commission found that this transaction would increase Comcast’s “incentive and ability” to discriminate against unaffiliated RSNs.³⁴ To remedy that concern, the Commission adopted a condition “allowing unaffiliated RSNs” – such as MASN – “to use commercial arbitration to resolve disputes regarding carriage on [Comcast’s] cable systems.”³⁵ The Commission emphasized that the purpose of the remedy was to “alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes.”³⁶ Under the *Adelphia Order*, RSNs had 30 days from the denial of carriage or “ten business days after release of th[e] Order” to file for arbitration.³⁷

21. *Second*, on July 25, 2006, the Commission issued an order finding that MASN had established a *prima facie* case under the Cable Act’s and the Commission’s non-discrimination rules against Comcast.³⁸ To address remaining factual issues, including those relating to remedy, the matter was referred to an administrative law judge (“ALJ”). The order then gave MASN 10 days (until August 4, 2006) to decide whether to accept this ALJ referral or, alternatively, to pursue the arbitration remedy provided under the *Adelphia Order*.³⁹

22. These orders had the effect of prompting Comcast to negotiate with MASN for carriage in August 2006. As Comcast has stated, it ultimately agreed to carry MASN in certain markets only “[u]nder heavy pressure from the FCC.”⁴⁰

23. On August 3 and 4, 2006, representatives for Comcast and MASN negotiated a carriage agreement. Matt Bond led the team negotiating for Comcast; David Gluck and Mark Wyche negotiated for MASN. Both parties executed an agreement for carriage in the late

³² 2005 Carriage Complaint at 1.

³³ See MASN Ex. 376.

³⁴ *Adelphia Order* ¶¶ 116, 189.

³⁵ *Id.* ¶ 181; see also *id.* ¶ 190.

³⁶ *Id.* ¶ 191.

³⁷ *Id.* ¶ 190.

³⁸ See Memorandum Opinion and Hearing Designation Order, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989, ¶¶ 11-12 (2006).

³⁹ See *id.* ¶ 13. The order provided no mechanism for any party to seek a continuance of that deadline other than through the normal process of obtaining a stay.

⁴⁰ See Proposed Findings of Fact and Conclusions of Law of Comcast Corporation at 2 (“Comcast PFOF”).

afternoon of August 4, 2006 (“Carriage Agreement”). Pursuant to the terms of the Carriage Agreement, Comcast began to carry MASN, in phased increments, to certain of its subscribers beginning in September 2006.⁴¹

24. MASN first learned in early 2007 that Comcast had not launched MASN on certain systems.⁴² Although scattered throughout MASN’s geographic footprint, the bulk of the areas foreclosed to MASN fall within three regions: the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs. Beginning in 2007, and continuing thereafter, MASN requested that Comcast carry MASN in the Foreclosed Areas. In particular, representatives for MASN travelled to Philadelphia to meet with representatives for Comcast to discuss this request in April 2007.⁴³ Ever since that meeting, Comcast has refused to carry MASN in the Foreclosed Areas.

25. Comcast is the only major MVPD in the Foreclosed Areas that does not carry MASN. Comcast has been offered carriage on the same prices, terms, and conditions under which other MVPDs carry MASN in the Foreclosed Areas. Those standard terms require carriage on one of the two most highly penetrated tiers of service, or any level of service that reaches at least [REDACTED] of the subscribers within a system.

26. Across MASN’s geographic footprint, there is a significant disparity between the number of Comcast subscribers who receive Comcast’s affiliated RSNs as compared to the number who receive MASN. Virtually 100 percent of Comcast subscribers receive a Comcast-affiliated RSN, specifically, CSN-MA, CSN-Philly, or both.⁴⁴ On the other hand, only about 87 percent of these subscribers receive MASN.⁴⁵ In total, Comcast does not provide MASN (but does provide a Comcast affiliated RSN) to approximately [REDACTED] subscribers within MASN’s footprint in the Foreclosed Areas.⁴⁶

⁴¹ See MASN Ex. 235, ¶ 5 (Cuddihy Written Test.).

⁴² See MASN Ex. 237, ¶ 29 (“MASN first learned in or around January 2007 that Comcast had not launched MASN on certain of its cable systems in MASN’s Territory.”) (Gluck Written Test.).

⁴³ See Tr. at 6068 (“There was a meeting in April with a number of representatives from both parties.”) (Gluck Test.).

⁴⁴ See MASN Ex. 70 (Comcast prepared list of subscribers); Tr. at 6503-04 (“Q: Thank you. So am I correct in stating that from this MASN Exhibit No. 70 very close to 100 percent of all Comcast systems carry CSN Philly or CSN MA? A: One or the other. Q: Yes. A: Yes. Q: Very close to 100 percent? A: Yes.”) (Ortman Test.).

⁴⁵ See Tr. at 6504 (“Not quite 100 percent, but very close to 100 percent. And am I correct that one could count up the number of systems that do not carry MASN and likely achieve a percentage of approximately 87 percent? A: It’s my understanding, yes.”) (Ortman Test.).

⁴⁶ See Comcast Ex. 4, ¶ 44 (“the [REDACTED] Comcast subscribers on the systems at issue represent about 13 percent of Comcast subscribers in MASN’s territory”) (Orszag Written Test.); see also Tr. at 7074 (“Q: [Comcast’s foreclosure] equates to [REDACTED] subscribers, true? A: That is correct.”) (Orszag Test.); MASN Ex. 70 (Comcast prepared list of subscribers).

Evidence of Disparate Treatment

27. Mr. Burke, the President of Comcast Cable, has admitted that Comcast's affiliated networks "get treated like siblings as opposed to like strangers."⁴⁷ Mr. Burke likewise admitted that Comcast's own networks receive a "different level of scrutiny."⁴⁸

28. Other Comcast documents confirm [REDACTED] Comcast's expert witness approved of such [REDACTED] calculations in deciding which programming Comcast would carry.⁵¹ As the cost of programming will always be cheaper if Comcast owns it,⁵² Comcast expressly admitted that Comcast would *always* favor its affiliated programming:

Q: So all other things being equal, Comcast should always favor their affiliate programming?

A: That's precisely why I don't believe this is the right standard to look at like this.

Q: Is the answer to my question, yes?

A: I said yes.⁵³

29. [REDACTED]

⁴⁷ MASN Ex. 243, at 7-8; *see also* Tr. at 7089 (Orszag Test.).

⁴⁸ MASN Ex. 243, at 8; *see also* Tr. at 7090 (Orszag Test.).

⁴⁹ *See* MASN Ex. 92.

⁵⁰ MASN Ex. 92, at 1.

⁵¹ *See* Tr. at 7148 ("Q: And it is your opinion, is it not, sir, that this [is] exactly the type of calculation Comcast should be making in deciding which program to carry? A: That is correct, but I don't know what other parts they have of this analysis here. I can't see all their assumptions.") (Orszag Test.).

⁵² *See* Tr. at 7148 ("Q: Isn't it true that the cost of programming is always going to be cheaper if Comcast owns it? A: Yes.") (Orszag Test.).

⁵³ *See* Tr. at 7149.

⁵⁴ MASN Ex. 99, at 1.

30. Other documents show that Comcast explicitly [REDACTED] [REDACTED]. This occurred on the eve of Comcast's carriage negotiations with MASN. Email correspondence on July 25, 2006, reflects [REDACTED] Pursuant to those discussions, Comcast employees [REDACTED] Three days later, on July 28, 2006, an email [REDACTED]

31. The [REDACTED] stated: [REDACTED]

" Attached to this email were [REDACTED]

32. Comcast's lead negotiator, Mr. Bond, received this information before beginning negotiations with MASN. Mr. Bond did not receive many emails from [REDACTED]⁶⁰ This information was circulated among just four of the most important executives within Comcast at the very time that Mr. Bond was preparing to negotiate with MASN for carriage. However, Mr. Bond testified that he did not recall the [REDACTED] [REDACTED]¹ or conversations about it.

33. Putting aside Mr. Bond's failure of recollection, internal documents show that he took action the day after receiving the [REDACTED] – even though it was a Saturday. On July 29, 2006, Mr. Bond directed his subordinates – for the first time – to determine "what

⁵⁵ MASN Ex. 102.

⁵⁶ See MASN Ex. 103.

⁵⁷ MASN Ex. 103, at 1.

⁵⁸ See MASN Ex. 103, at 2-3.

⁵⁹ See MASN Ex. 103, at 4-9.

⁶⁰ See Tr. at 6834 ("JUDGE SIPPEL: But . . . you don't get a lot of memos from [REDACTED] going to you, do you? THE WITNESS: I don't. That's correct. JUDGE SIPPEL: Well, why wouldn't this have some significance to you then, if this is coming from [REDACTED] and he wants you to have a copy of it?") (Bond Test.).

⁶¹ See Tr. at 6874 ("Q: And you testified in your deposition that you did not recall receiving this document? A: Yes, that's correct. Q: In the intervening time since your deposition, and having an opportunity to reflect on this document, has your memory been refreshed as to receiving this information? A: No, I don't recall it.") (Bond Test.).

systems on the periphery [of MASN's footprint] we can carve off.”⁶² Mr. Bond also expressly asked – again for the first time – “What are the total subs that we would be giving them?”⁶³

34. [REDACTED]

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35. Transactions between affiliated entities are more difficult to police for anti-competitive concerns.⁶⁹ Even though it is particularly important to guard against anti-competitive behavior in places that are not publicly monitored,⁷⁰ Comcast takes no measures to separate its distribution and programming arms. To the contrary, internal documents confirm that Comcast encourages a close relationship between these branches. Comcast invites its cable executives to attend the budget meetings of Comcast's RSNs.⁷¹

⁶² MASN Ex. 104, at 1.

⁶³ MASN Ex. 104, at 1.

⁶⁴ See Tr. at 6773 [REDACTED]

(Bond Test.).

⁶⁵ See Tr. at 6824-25 (“Q: And yet, [REDACTED]

(Bond Test.).

⁶⁶ See Representations of Counsel for Comcast (Apr. 28, 2009 Letter) [REDACTED]

⁶⁷ See Tr. at 6772 [REDACTED]

(Bond Test.).

⁶⁸ See Tr. at 6789 (“Q: Sitting here today, are there any other unaffiliated regional sports networks that have been [REDACTED]? A: I can't think of any.”) (Bond Test.).

⁶⁹ See Tr. at 7238-39 (“Q: And the flip side is also true, correct, that transactions between affiliated firms are harder to police for anti-competitive content? A: Yes.”) (Orszag Test.).

⁷⁰ See Tr. at 7239 (“Q: You need to be especially careful to make sure that anti-competitive activity isn't going on in places where it can't be publicly monitored, correct? “A: Yes. That's why we want to look at the behavior of other MVPDs.”) (Orszag Test.).

⁷¹ See MASN Ex. 136, at 14 (“[REDACTED]

”).

36. [REDACTED]
Mr. Ortman admitted that “it would be troubling if a programmer’s rate card were shared with a competitor.”⁷² [REDACTED]
[REDACTED]

37. Almost immediately after it entered into the Carriage Agreement with MASN, Comcast increased the rates it charged to its subscribers by the full amount of MASN’s license fees.⁷⁵ It was highly unusual for Comcast to create a mid-year rate hike. Comcast also sent a letter to its subscribers blaming this rate hike on the cost of MASN.⁷⁶ Comcast had never before sent out a letter ascribing such a rate hike to a particular programmer, much less one of its affiliated RSNs.⁷⁷ Comcast also was the only MVPD to act in this manner. Although all MVPDs obtain MASN at the same rates charged to Comcast, no other MVPD raised its rates after carrying MASN or mailed a letter to subscribers describing the cost of MASN.

38. Comcast has alleged low demand for MASN in some of the Foreclosed Areas as the reason for its non-carriage. That is not a standard Comcast has ever applied to its affiliated RSNs. There is no evidence that Comcast has ever studied or analyzed the demand for its affiliated RSNs in making a carriage decision⁷⁸ – except for an internal study showing that

⁷² Tr. at 6534 (“Q: In your deposition you said it would be troubling if a programmer’s rate card were shared with a competitor; do you recall that? A: Yes. Q: And do you stand by it today? A: Yes.”) (Ortman Test.).

⁷³ See MASN Ex. 108 ([REDACTED]).

⁷⁴ See Tr. at 6534 (“Q: And you wouldn’t give a CSN affiliated agreement to MASN, would you? A: No. Q: Because it would be confidential? A: Correct. I don’t have it, but also because it’s confidential; that’s correct.”) (Ortman Test.).

⁷⁵ See Tr. at 6821 (“Q: You’re aware that Comcast sent out a notice to its subscribers in September 2006 of a rate increase. Correct? A: Yes.”) (Bond Test.).

⁷⁶ See Tr. at 6821 (“Q: And that notice blamed MASN for the rate increase. Correct? A: Yes.”) (Bond Test.); *see also* MASN Ex. 13 (“‘MASN’s programming is very expensive to distribute. It will cost literally hundreds of millions of dollars over the next decade,’ Comcast Executive Vice President David L. Cohen said in a written statement. ‘These are costs that will ultimately have to be borne by cable customers.’”).

⁷⁷ See Tr. at 6822 (“Q: In fact, you can’t think of any other example in which Comcast blamed a particular network for a rate increase. Correct? A: Yes.”) (Bond Test.).

⁷⁸ See Tr. at 7355-56 (“Okay. Did you do any research or analysis into whether Comcast is treating MASN differently from Comcast owned RSNs? A: I did not. Q: Do you know what the demand is for Comcast SportsNet Mid-Atlantic in any region across its footprint? A: I do not. Q: Do you know what the demand is for Comcast SportsNet Philadelphia in any region across its footprint? A: I do not.”) (Gerbrandt Test.); Tr. at 7357 (“Q: Because Comcast never asked you to study the demand for those products, true? A: That is correct.”) (Gerbrandt Test.);

[REDACTED]⁸⁰ Comcast did not reduce its license fees or send a letter to subscribers blaming CSN-MA for keeping its fees high despite having lost its most valuable programming.

39. RSNs often have conflicts with the professional sporting events that they telecast. When two or more events occur during the same time period, an RSN typically telecasts the conflicting event on an “overflow” channel.⁸¹ MASN requires a non-dedicated overflow channel to telecast games of the Nationals or the Orioles when both teams are playing at the same time.⁸² Comcast has consistently expressed concerns about MASN’s overflow requirements, and has indicated that this is a reason for not carrying MASN in the Foreclosed Areas.⁸³ Comcast has taken pains, however, to ensure that its affiliated RSN, CSN-MA, would have whatever overflow channels were necessary to telecast its conflicting events.⁸⁴ And that is despite the fact that Comcast had no knowledge about whether such overflow channels were required by a contract.⁸⁵

see also Tr. at 6807-08 (acknowledging he is not aware of any demand studies of any type ever done for CSN-MA) (Bond Test.).

⁷⁹ *See* MASN Ex. 99.

⁸⁰ *See, e.g.*, MASN Ex. 118, at 1-2 ([REDACTED]).

⁸¹ Tr. at 5604 (Cuddihy Test.).

⁸² *See* Tr. at 5604 (MASN contracts “provide[] for operators to provide us with a part time expanded basic channel” for overflow games) (Cuddihy Test.).

⁸³ *See* MASN Ex. 235, ¶ 35 (Cuddihy Written Test.).

⁸⁴ *See* MASN Ex. 235, ¶ 34 (“Comcast readily made accommodations to ensure that all of CSN-MA’s live sports programming could be telecast even if that meant interrupting programming on other channels to do so.”) (Cuddihy Written Test.); *see also* Tr. at 6527-28 (“Q: [W]hen [there was a conflict situation for CSN-MA] Comcast had to scramble to find another channel to put on the game correct? A: Yes, we did.”) (Ortman Test.).

⁸⁵ *See* Tr. at 6528 (“Q: . . . You don’t know whether Comcast was required by contract to put that game, that conflict game, on another channel? A: That is correct; I do not.”) (Ortman Test.).

40. “Split feeds” permit a programming network to sell targeted geographic markets to advertisers. A Comcast executive, Mr. Ortman, freely permitted CSN-MA the ability to offer split feeds in the mid-2000 time period.⁸⁶ When MASN requested split feeds in 2007,⁸⁷ however, Mr. Ortman refused, stating that its contract did not permit split feeds.⁸⁸ Mr. Ortman never looked at the CSN-MA contract to see if it permitted split feeds.⁸⁹ Mr. Ortman admitted that contracts are “an important component of a relationship” with programmers,⁹⁰ but that he did not know whether such a written contract between Comcast and CSN-MA existed.⁹¹ [REDACTED]

41. Comcast has not adopted any internal practices or procedures to address the problems of affiliation-based discrimination created by Comcast’s substantial vertical integration of distribution and programming. MASN’s lead negotiator – Mr. Bond – testified that he never received any training with respect to affiliation-based discrimination.⁹³ Mr. Ortman, who was tasked with “carv[ing] off” systems from MASN’s territory, “never received any [formal] training on Comcast’s obligations under the Adelphia Order.”⁹⁴ And, despite having received training and instruction regarding sexual harassment and workplace safety, Mr. Ortman has received no training with respect to affiliation-based discrimination.⁹⁵

⁸⁶ See Tr. at 6516-17 (“Q: You embarked with CSN MA in doing split feeds in the mid-2000s or before, is that correct? A: Correct.”) (Ortman Test.).

⁸⁷ See Tr. at 6517 (“Q: In 2007, you became aware of MASN want[ing] to do split feeds; correct? A: Correct.”) (Ortman Test.).

⁸⁸ See Tr. at 6509 (“Q: They should be held strictly to the written contract? A: Unless some alternative arrangement is made, that is correct.”) (Ortman Test.).

⁸⁹ See Tr. at 6517-18 (“Q: You never looked at the CSN-MA contract to determine whether it permitted CSN MA to do split feeds; is that correct? A: That’s correct.”) (Ortman Test.).

⁹⁰ Tr. at 6509 (Ortman Test.).

⁹¹ See Tr. at 6505 (“Q: Okay. [REDACTED]”) (Ortman Test.); Tr. at 6509 (“Q: . . . [REDACTED]”) (Ortman Test.).

⁹² See Tr. at 6772 (Bond Test.).

⁹³ See Tr. at 6767 (“Q: Are you aware that MASN alleges that this is a discrimination case? A: Yes. Q: Is it true that you’ve had no training on discrimination on the basis of affiliation. A: Yes.”) (Bond Test.).

⁹⁴ See Tr. at 6688 (Ortman Test.).

⁹⁵ See Tr. at 6688 (“Q: But you never had training on discrimination based on affiliation. Correct? A: No formal training, that’s correct.”) (Ortman Test.).

Comcast's Motivation and Incentives To Favor Its Affiliated RSNs

42. Comcast has an affirmative strategy to acquire RSN programming. Mr. Roberts, the CEO of Comcast Corporation, stated that RSN programming, like MASN's, is "the most compelling local programming there is."⁹⁶ Internal documents confirm Comcast's view that RSN programming is "'must-have' programming, cost-considerations aside."⁹⁷ Comcast's views are consistent with the Commission's findings that "the programming provided by RSNs is unique" and "is particularly desirable and cannot be duplicated."⁹⁸

43. Comcast's business is approximately 95 percent distribution and only 5 percent programming.⁹⁹ [REDACTED]

44. [REDACTED]

45. [REDACTED] In order for Comcast's strategy to succeed, however, "Comcast SportsNet" must be [REDACTED] Unaffiliated RSNs, therefore, must be marginalized, lest they become threats to Comcast RSNs' [REDACTED]"

⁹⁶ MASN Ex. 136, at 2.

⁹⁷ MASN Ex. 136, at 2.

⁹⁸ *Adelphia Order* ¶ 189.

⁹⁹ *See* Tr. at 7063 (Orszag Test.).

¹⁰⁰ *See* Tr. at 7064-65 (Orszag Test.).

¹⁰¹ MASN Ex. 134, at 11.

¹⁰² MASN Ex. 134, at 12.

¹⁰³ MASN Ex. 134, at 12.

¹⁰⁴ MASN Ex. 136, at 8.

¹⁰⁵ MASN Ex. 136, at 11.

46. Comcast is well aware of how it can leverage its programming assets to aid its distribution business. Comcast denies its major competitors, DirecTV and DISH, the ability to carry CSN-Philly in Philadelphia.¹⁰⁶ Comcast has touted the success of this foreclosure strategy.¹⁰⁷ This denial has allowed Comcast Cable to increase its share of the market. An internal Comcast document lists as a [REDACTED]

47. CSN-Philly forgoes [REDACTED] in license fees each year as a result of Comcast's decision to deny this programming to DirecTV and DISH.¹⁰⁹ If it were independent of Comcast, CSN-Philly would clearly agree to provide carriage to DirecTV and DISH, which would result in [REDACTED] in additional license fees each year.¹¹⁰ But Comcast prevents CSN-Philly from acting in its own best interests. [REDACTED]

48. Comcast's use of CSN-Philly confirms that its affiliated RSNs are not independent actors, but rather, an extension of Comcast's distribution arm that are used as necessary to further Comcast's overall interests.¹¹² Comcast's own witness testified that "I've cited the Philadelphia example as one that may raise competitive concerns."¹¹³ Comcast's expert, Mr. Orszag, admitted that Comcast's foreclosure "reduced the[] competitive appeal" of DirecTV and DISH, thereby reducing their "ability to compete vigorously because they don't have key programming."¹¹⁴ When asked whether Comcast's foreclosure "helps Comcast

¹⁰⁶ Tr. at 6856 ("Q: And, notwithstanding, that there's demand for CSN Philly in Philadelphia, it is not made available to satellite providers. A: Yes.") (Bond Test.).

¹⁰⁷ See MASN Ex. 135, at 68 (Comcast document listing [REDACTED]).

¹⁰⁸ MASN Ex. 135, at 68.

¹⁰⁹ See MASN Ex. 135, at 68; *see also* Tr. at 7234 ("So the cons of this approach, the CSN Philly model is that the RSN [REDACTED] per year, correct? A: According to this, yes. . . .") (Orszag Test.).

¹¹⁰ Tr. at 7227 ("Q: That's an example of Comcast SportsNet Philadelphia not doing what's in the best interest of Comcast SportsNet Philadelphia, correct? A: Within the four corners of Comcast SportsNet Philadelphia, you are correct.") (Orszag Test.).

¹¹¹ MASN Ex. 135, at 68; *see also* Tr. at 7227 ("I don't know if it's who at Comcast corporate or where it comes from, but Comcast as a company does not distribute the programming to Dish.") (Orszag Test.); Tr. at 7229 ("Q: And that's just Comcast doing what's best for Comcast, right? A: I assume that Comcast is being rational, yes.") (Orszag Test.).

¹¹² See Tr. at 7228 ("Q: And they're willing to lose that revenue for Comcast SportsNet Philly because Comcast Cable benefits, correct? A: Precisely.") (Orszag Test.).

¹¹³ Tr. at 7239 (Orszag Test.).

¹¹⁴ Tr. at 7222 (Orszag Test.).

[promote its] competitive position,” Mr. Orszag responded: “Yes, why else would they have done it?”¹¹⁵

49. Comcast competes with MASN for programming rights. Internal documents confirm that [REDACTED]¹¹⁶ Prices generally rise when bidders enter the market. With MASN’s emergence, Comcast employees [REDACTED] Comcast discussed this explicitly: [REDACTED] and concluded, [REDACTED]

50. MASN and CSN-MA are “close competitors” for programming content.¹²⁰ They have competed for the rights to telecast pre-season games and ancillary programming of the Baltimore Ravens and the Washington Redskins, both National Football League (“NFL”) teams, and the D.C. United, which is a professional soccer team.¹²¹ MASN holds programming rights to Big East basketball, including Villanova University and the University of Pittsburgh, that would be attractive to CSN-Philly. Moreover, Comcast shares programming between CSN-MA and CSN-Philly.¹²² Comcast has the ability to dictate the manner in which certain rights are distributed among – or shared between – its programming arms.¹²³ In seeking the rights to the Nationals, Comcast made clear that it would broadcast those rights “across the Nationals’ territory” by “carry[ing] the games on Comcast SportsNet, CN8, or another available cable

¹¹⁵ Tr. at 7222-23 (Orszag Test.).

¹¹⁶ See Tr. at 7113 (“Q: Isn’t it true that Comcast was unhappy that MASN was entering the market of programming rights? A: I haven’t seen evidence to suggest that they’re unhappy or happy. I would presume as competitors that most competitors don’t like more competition.”) (Orszag Test.).

¹¹⁷ See Tr. at 7113 (“Q: Do prices generally go up when bidders enter the market? A: I’ll accept the ‘generally,’ yes.”) (Orszag Test.).

¹¹⁸ MASN Ex. 115, at 2.

¹¹⁹ MASN Ex. 115, at 2.

¹²⁰ Tr. at 7112 (“I would agree that they are close competitors for programming content.”) (Orszag Test.).

¹²¹ See Tr. at 7112 (Orszag Test.).

¹²² See Tr. at 7124-25 (“Q: And in fact, Comcast SportsNet Mid-Atlantic and Philadelphia share content today, don’t they? A: I believe they share some form of ESPN content.”) (Orszag Test.).

¹²³ See Tr. at 7124 (“Q: Okay, but if the programming rights contracts permitted it, Comcast could put it in whatever arm it wants to, correct? A: Between the two, yes, that is correct.”) (Orszag Test.).

channel.”¹²⁴ Comcast did not specify a particular CSN channel, and included as an option yet another programming channel it owned, CN8. It is evident that Comcast can spread programming around its various content channels in order to obtain the distribution that it desires. Comcast touts its downstream distribution channels as providing content owners with the ability to reach large numbers of viewers.¹²⁵

51. Comcast also competes with MASN for viewers and advertisers. Comcast’s affiliated RSNs target males 18 to 49 as its key demographic.¹²⁶ That is the same key demographic for MASN.¹²⁷ Across MASN’s footprint, both MASN and Comcast (through CSN-MA and CSN-Philly) seek these viewers. Across MASN’s footprint, advertisers seeking to reach this demographic can choose between MASN and Comcast (through CSN-MA and CSN-Philly).

52. Other Comcast documents confirm the fact that Comcast’s RSNs compete with MASN. For example,

Another internal document made the

Comcast’s Bias Against MASN

53. In 2004, MLB Commissioner Allen H. (Bud) Selig announced that the Montreal Expos franchise would be relocated to Washington, D.C. That team was renamed as the Washington Nationals. The Nationals began playing baseball in Washington, D.C., at the beginning of the 2005 MLB season.¹³⁰

54. Comcast competed vigorously for the rights to telecast the Nationals.¹³¹ Internal documents show that

¹²⁴ MASN Ex. 2, at 2.

¹²⁵ See MASN Ex. 139, at 2 (RSN presentation slide titled “[redacted]” and listing “[redacted]” with “[redacted]” in relevant areas).

¹²⁶ See Tr. at 7133 (“Q: Isn’t it true that Comcast SportsNet says its key demographic is males 18 to 49? A: I’ve seen documents to that effect, yes.”) (Orszag Test.).

¹²⁷ See Tr. at 7134 (“Q: Isn’t that the same key demographic for MASN, males 18 to 49? A: Yes.”) (Orszag Test.).

¹²⁸ MASN Ex. 128 (emphasis added).

¹²⁹ MASN Ex. 122.

¹³⁰ See MASN Ex. 235, ¶ 4 (Cuddihy Written Test.).

¹³¹ See Tr. at 6741 (“We clearly were interested in seeking the [Nationals] rights.”) (Bond Test.).

viewed this programming to be ¹³² Comcast

¹³³

55. When Commissioner Selig ultimately assigned these rights to MASN, Comcast vigorously tried to undo that decision. On April 6, 2006, Stephen Burke, the President of Comcast Cable, wrote a letter to Mr. Selig alleging that MASN was paying a “below-market rights fee to the Nationals (a rights fee lower than that which [Comcast was] willing to pay).”¹³⁴ Mr. Burke “propose[d] a resolution” that he pledged would “allow[] the games of the Nationals *to be seen across the Nationals’ territory* immediately.”¹³⁵ The next day, on April 7, 2006, Mr. Cohen, the Executive Vice President for Comcast Corporation, testified before Congress that MASN was paying the Nationals “well below what we believe the market rate is.”¹³⁶ Mr. Cohen also referred to the decision to assign the Nationals rights to MASN as “original sin,” and disparaged MASN as “for nearly 8,000 hours a year . . . offer[ing] nothing but a dark screen.”¹³⁷

56. Despite having vigorously pursued the rights to telecast the Nationals, Comcast refused to carry MASN anywhere for nearly two full baseball seasons – even in Washington, D.C.¹³⁸

57. Before 2007, Comcast had the contractual rights to produce and exhibit Orioles games on pay television. Comcast telecast those games throughout the Orioles television territory though CSN-MA.¹³⁹ Those rights terminated when the 10-year contract that began in 1996 expired at the end of the 2006 MLB season. As early as 2002, however, Comcast was aware that the Orioles might not renew this contract when it expired in 2006.¹⁴⁰

¹³² See MASN Ex. 91, at 1

¹³³ MASN Ex. 91, at 4.

¹³⁴ MASN Ex. 2, at 2.

¹³⁵ MASN Ex. 2, at 2 (emphasis added).

¹³⁶ MASN Ex. 3, at 3.

¹³⁷ MASN Ex. 3, at 1-2 (internal quotation marks omitted). MASN launched as a full 24/7 network on July 31, 2006.

¹³⁸ See MASN Ex. 235, ¶ 5 (Cuddihy Written Test.) (“Despite aggressively seeking the rights to both the Orioles and the Nationals, which it lost to MASN, Comcast refused to carry MASN for nearly two full MLB seasons.”).

¹³⁹ See MASN Ex. 235, ¶¶ 3, 11-13 (Cuddihy Written Test.).

¹⁴⁰ See MASN Ex. 231 (Orioles February 19, 2002 Press Release titled “Orioles [to] Establish Broadcasts Television Network” and stating “[t]he Orioles are proud to be part of the groundswell of regional sports networks owned by a Major League team”).

58. Comcast fought vigorously to retain the rights to telecast Orioles games.¹⁴¹ On April 21, 2005, Comcast filed a lawsuit against MASN and the Orioles seeking to maintain those rights.¹⁴² That same day, Comcast also sent letters to every MVPD in MASN's footprint warning that entering into an affiliation agreement with MASN could "evidence a serious and material breach of Comcast SportsNet's contractual rights."¹⁴³ Notably, Comcast sent these letters to MVPDs operating in the Foreclosed Areas where, during this litigation, Comcast has alleged an insufficient demand for MASN.¹⁴⁴ In September 2005, a court dismissed Comcast's lawsuit.

59. Frustrated by its inability to procure Orioles programming rights, in the summer of 2006 a senior Comcast executive wrote that [REDACTED]
[REDACTED] Another senior Comcast executive
appealed directly to Mr. Burke, stating that it was "[REDACTED]"
[REDACTED] Mr. Burke
himself replied: [REDACTED]"

Negotiations for the Carriage Agreement

60. Two MASN representatives, Messrs. Gluck and Wyche, testified regarding the carriage negotiations with Comcast in August 2006.¹⁴⁸ This Tribunal observed them testify in person and found them to be highly credible. Comcast provided no witness or other evidence to dispute their recollections of these events. Mr. Bond was the only Comcast witness who participated in these negotiations, and he did not dispute *any* of Mr. Gluck's or Mr. Wyche's recollections about these carriage negotiations. Mr. Bond, who was Comcast's lead negotiator, testified that he did not recall several specific details of those negotiations.¹⁴⁹

61. On August 3, 2006, representatives for Comcast and MASN held multiple telephone conversations to discuss a carriage agreement.¹⁵⁰ MASN's offer was reflected in the term sheet that it had sent to Comcast on July 25, 2006, requesting carriage on "all Comcast

¹⁴¹ See Tr. at 6740 ("Q: Is it true that Comcast wanted to keep the Orioles with Comcast Sports Net Mid-Atlantic? A: Yes.") (Bond Test.).

¹⁴² See MASN Ex. 237, ¶ 13 (Gluck Written Test.).

¹⁴³ E.g., MASN Exs. 31-60, at 1.

¹⁴⁴ E.g., MASN Ex. 41 (Letter to Blue Ridge Cable Technologies, Inc.); MASN Ex. 44 (Letter to Cox Communications); MASN Ex. 48 (Letter to Giles Craig Communications).

¹⁴⁵ MASN Ex. 107, at 1.

¹⁴⁶ MASN Ex. 107, at 1.

¹⁴⁷ MASN Ex. 107, at 1.

¹⁴⁸ See generally Tr. at 5860-6039 (Wyche Test.); Tr. at 6041-147 (Gluck Test.).

¹⁴⁹ See generally Tr. at 6730-983 (Bond Test.).

¹⁵⁰ See MASN Ex. 237, ¶ 19 (Gluck Written Test.).

systems” within MASN’s footprint. During one of the calls on August 3rd, Mr. Bond responded to that offer with a counteroffer.¹⁵¹

62. Comcast’s counteroffer contained three key parts. *First*, Mr. Bond said that Comcast would quickly launch MASN on most of its cable systems – those that served approximately 1.6 million subscribers – by September 1, 2006. *Second*, Mr. Bond stated that Comcast “had approximately 750,000 *remaining* subscribers throughout [MASN’s] territory.”¹⁵² He proposed to launch MASN on systems reaching about 600,000 of these subscribers by April 1, 2007. *Third*, Mr. Bond stated that Comcast could not launch systems servicing approximately 150,000 subscribers. He stated that these systems were located in Roanoke/Lynchburg and other parts of Virginia, and that they were part of the former Adelphia cable systems that Comcast was then acquiring. Mr. Bond represented that these cable systems were low-bandwidth and did not have sufficient capacity to carry MASN.¹⁵³ Another negotiator for Comcast later said of these cable systems: “We don’t know what we have.”¹⁵⁴ When MASN asked Comcast to identify these systems, Comcast stated that it was unable to do so.¹⁵⁵

63. Based upon Comcast’s representations, MASN agreed not to require the former Adelphia systems in Roanoke/Lynchburg and other Virginia areas to be launched by a date certain. MASN believed that any such foreclosure would be temporary. This was so because MASN understood that Comcast had committed to rebuild the former Adelphia systems such that they would have sufficient capacity to carry MASN in the near future.¹⁵⁶ In accepting this compromise, however, MASN made clear to Comcast that “it’s got to be everything else.”¹⁵⁷ At no point during its negotiations with MASN did Comcast disagree, nor did Comcast mention excluding any other systems or subscribers.¹⁵⁸

64. During the carriage negotiations with MASN in August 2006, Comcast sought a [REDACTED] across-the-board reduction in MASN’s license fees.¹⁵⁹ The parties ultimately agreed

¹⁵¹ See MASN Ex. 236, ¶ 34 (“During that call, I recall Mr. Bond making a multi-part proposal.”) (Wyche Written Test.).

¹⁵² Tr. at 5875 (Wyche Test.) (emphasis added).

¹⁵³ See MASN Ex. 236, ¶ 35 (Wyche Written Test.).

¹⁵⁴ Tr. at 6079-80 (Gluck Test.).

¹⁵⁵ See Tr. at 6079-80 (Gluck Test.).

¹⁵⁶ See MASN Ex. 236, ¶ 35 (Wyche Written Test.); Tr. at 6059 (“I understood at the time that they had made some representations to the FCC that they would be ultimately upgrading all the systems that they would acquire from Adelphia and then they would be able to . . . [launch] MASN once those were upgraded.”) (Gluck Test.).

¹⁵⁷ Tr. at 6141 (Gluck Test.).

¹⁵⁸ Tr. at 6062 (Comcast “had committed to launching everything other than those Adelphia systems constituting 150,000 subscribers”) (Gluck Test.).

¹⁵⁹ Tr. at 6060 (“Comcast asked for [a] reduction of 10 percent across the board in every region.”) (Gluck Test.).

to a [REDACTED] across-the-board reduction.¹⁶⁰ Because of its obligations to other MVPDs, this concession required MASN to reduce the license fees it charged to every other MVPD by this same amount.¹⁶¹ Except for the across-the-board rate reduction, Comcast never mentioned that the price for MASN was too high in any particular region or area.¹⁶² Likewise, Comcast never suggested that demand for MASN was too low in any particular region to justify the price that MASN was charging.¹⁶³

65. On August 4, 2006, Comcast amended its counteroffer. Of the 600,000 subscribers that Comcast had proposed to launch by April 1, 2007 (the second part of its counteroffer), Comcast sought to delay for a year in launching 150,000.¹⁶⁴ In other words, Comcast would launch 450,000 of the 600,000 by April 1, 2007, and the other 150,000 by April 1, 2008. (This 150,000 figure is wholly unrelated to the 150,000 subscribers who were part of the former Adelphia systems the parties had agreed to exclude from the Carriage Agreement.) MASN agreed to this delay.

66. At 1:31 p.m. on August 4, 2006, Andrew Rosenberg, a Comcast representative, sent MASN an email “attach[ing] a redline of your most recent term sheet that reflects the deal we’ve been discussing over the past two days as well as some other clean-up changes.”¹⁶⁵ For the first time, Comcast provided a completed List of Systems to replace the blank form in MASN’s proposed term sheet, and attached that completed list as “Schedule A” to the Agreement.

67. Among dozens of redlined edits, Comcast had struck the language requiring carriage on “all” Comcast systems, and inserted language permitting Comcast to carry MASN on those systems not listed on Schedule A “in Comcast’s discretion.”¹⁶⁶ Mr. Gluck contacted Mr. Rosenberg to ask why. Mr. Rosenberg represented that these edits were intended to ensure that Comcast was not obligated to launch the former Adelphia systems, as the parties had

¹⁶⁰ Tr. at 6931-32 (Bond Test.).

¹⁶¹ Tr. at 6060 (Gluck Test.).

¹⁶² Tr. at 6060-61 (“Q: Okay, what about specific regions, did they ever say the price in a specific region was too high? A: No, we didn’t negotiate on specific regions that I recall.”) (Gluck Test.); *see also* Tr. at 6932-33 (acknowledging there was “no specific price negotiation” with respect to any of MASN’s zones or any of the Foreclosed Areas other than “a discount over the entire MASN territory”) (Bond Test.).

¹⁶³ Tr. at 6061 (“Q: – did Comcast ever mention low demand for MASN anywhere? A: No, there was no discussion of demand.”) (Gluck Test.).

¹⁶⁴ *See* MASN Ex. 237, ¶ 20 (Gluck Written Test.).

¹⁶⁵ Comcast Ex. 14, at 14-1; MASN Ex. 89, at 29.

¹⁶⁶ Comcast Ex. 14, at 14-2.

discussed, but had the right to do so after they had been upgraded.¹⁶⁷ Mr. Rosenberg also explained that the “discretion” language would permit Comcast to launch MASN on any new systems that it might acquire during the 10-year term of the agreement.¹⁶⁸ MASN accepted these representations (which were entirely consistent with the text of the discretion clause).¹⁶⁹ MASN further understood that Comcast’s discretion would be limited by its obligations under federal law and this Commission’s regulations, including Comcast’s obligations not to discriminate against MASN in favor of its affiliated RSNs.¹⁷⁰

68. Everyone at MASN believed that Schedule A contained a complete list of Comcast systems within MASN’s footprint, except for the former Adelphia systems the parties had discussed.¹⁷¹ Within three hours of receiving the redlined term sheet and Schedule A, MASN entered into a final Carriage Agreement with Comcast. Except for the incomplete list that Comcast prepared and attached as Schedule A, which is discussed in detail below, MASN had no complaints or disagreements with the Carriage Agreement.¹⁷²

69. Other than the Adelphia systems, Comcast never provided MASN with any indication that it was excluding any of its cable systems within MASN’s footprint.¹⁷³ Comcast at

¹⁶⁷ Tr. at 6063 (“And so I called Andrew and I said, ‘What are we doing here, why did you make this change?’ He said, ‘I want to make sure it reflects that the Adelphia systems aren’t included in here, because it’s not all systems we’re launching.’”) (Gluck Test.).

¹⁶⁸ Tr. at 6064-65 (“The discretion issue had to do with, what Andrew said was, with respect to the Adelphia systems, number one, we hadn’t set a date certain for them to launch the Adelphia systems because they couldn’t tell us when they’d be upgraded” and because “[i]f Comcast acquired additional systems from other operators during the term [of the agreement], they could launch those.”) (Gluck Test.).

¹⁶⁹ Tr. at 6064-65 (“I took him at his word for that.”) (Gluck Test.).

¹⁷⁰ Tr. at 6126 (“Well, what we said was that they would be at their discretion, but their discretion is not unfettered. They’re covered by whatever applicable FCC laws and other laws may apply.”) (Gluck Test.); *see also* Tr. at 6919 (“Q: And another limitation on Comcast’s discretion is federal regulatory law, correct? A: Yes.”) (Bond Test.).

¹⁷¹ Tr. at 6087 (“JUDGE SIPPEL: So I take it, you took Schedule A at face value. THE WITNESS: Yes, I did, everybody did at MASN.”) (Gluck Test.); *see also* MASN Ex. 237, ¶ 28 (“We had no knowledge that Comcast intended to exclude approximately [REDACTED] Pennsylvania subscribers.”); *id.* at ¶ 30 (“incorrect” that “MASN knew Comcast had not launched, and was under no obligation to launch, MASN on the unlaunched Comcast systems”) (Gluck Written Test.).

¹⁷² Tr. at 6136-37 (“Q: . . . If Comcast had given you . . . the list on Schedule A of systems that you thought you had agreed to, do you have any other complaint with any other part of that agreement? Any word being struck? Any line being added? Any other change? A: No.”) (Gluck Test.).

¹⁷³ *See* MASN Ex. 237, ¶¶ 23-24, 27 (Gluck Written Test.).

no time mentioned the Harrisburg or Tri-Cities DMAs for any reason.¹⁷⁴ Comcast did mention the Roanoke/Lynchburg region, but only in the context of the low-bandwidth Adelphia systems that, according to Comcast, did not have the capacity to carry MASN until they were upgraded.

70. If Comcast had requested excluding the Foreclosed Areas for lack of demand, MASN would have objected. MASN would not knowingly have entered into an agreement that did not include the Foreclosed Areas.¹⁷⁵

71. Schedule A did not accurately reflect Comcast's negotiations with MASN. *First*, Schedule A excluded numerous systems that were unrelated to the Adelphia systems the parties had discussed. These included Comcast systems with large numbers of subscribers in the Harrisburg and Tri-Cities DMAs. *Second*, Schedule A included several former Adelphia systems that the parties had agreed to exclude based on Comcast's representations of low-bandwidth.¹⁷⁶

72. Significant questions remain about Schedule A. Comcast did not offer evidence, for example, of who prepared Schedule A, when it was prepared, how many drafts were prepared, or what systems were included or excluded in prior versions.¹⁷⁷ This information is entirely within Comcast's custody and control. It is therefore reasonable to infer that this missing evidence about Schedule A would not have been favorable to Comcast.¹⁷⁸

73. MASN did not discover that Comcast had excluded systems from Schedule A (beyond the Adelphia Exclusion) until January 2007.¹⁷⁹ Like MASN, Comcast's lead negotiator, Mr. Bond, did not learn that Comcast had excluded systems in the Harrisburg and Tri-Cities DMAs until many months after the Carriage Agreement had been executed.¹⁸⁰

¹⁷⁴ See MASN Ex. 237, ¶ 20 ("No mention was made during that conference call or at any other time prior to consummation of the August 4 agreement that any other Comcast systems [than the Adelphia Exclusion] would not launch MASN.") (Gluck Written Test.); see also Tr. at 6914 ("I don't recall that I discussed, specifically discussing unlaunched areas with the MASN representatives when I did this, no.") (Bond Test.).

¹⁷⁵ Tr. at 6125 ("A: And I will tell you that had they told us they weren't launching those we wouldn't have gotten the deal done because we made it clear all along that it had to be all systems and they knew that. There would not have been a deal done. Q: So that would have been a deal breaker[?] A: Absolutely.") (Gluck Test.).

¹⁷⁶ See Comcast Ex. 2, ¶ 22 (listing recently acquired Adelphia systems included on Schedule A) (Ortman Written Test.).

¹⁷⁷ See Comcast PFOF ¶¶ 75-82.

¹⁷⁸ See *United States v. Steve*, 919 F.2d 182 (Table), 1990 WL 194509, at *2 (D.C. Cir. 1990); *International Union, UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

¹⁷⁹ See MASN Ex. 237, ¶ 29 (Gluck Written Test.).

¹⁸⁰ See Tr. at 6915 ("I don't recall specifically thinking about Harrisburg when we were doing that agreement.") (Bond Test.); Tr. at 6929 ("Q: In negotiating the deal with MASN, you did not think about whether the Tri-Cities would be included on the list of Schedule A? A: No, I didn't think.") (Bond Test.).

74. Common industry practice requires that the MVPD provide an accurate list of its systems to the programmer and to fill in any schedule of launched systems in a carriage agreement (practices reflecting the superior information of the MVPD).¹⁸¹ With decades of combined experience, during which they have negotiated hundreds of carriage agreements, Messrs. Gluck and Wyche have never received an incomplete list of systems from an MVPD – until Comcast provided an incomplete list to MASN in August 2006.¹⁸²

75. No publicly available information would have provided a reliable means to determine whether Comcast's list of systems was accurate.¹⁸³ Comcast does not publicly report subscriber totals for its individual systems. Even if a particular system's name corresponds to its actual geographic location, it remains unclear which geographies that system serves. After MASN discovered the exclusion of certain systems in January 2007, it nonetheless took many months of discussions with Comcast to assemble an accurate list of the Foreclosed Areas.¹⁸⁴ Those extended attempts to compile an accurate list show that MASN could not reasonably have verified the accuracy of Schedule A in August 2006. Indeed, Mr. Bond admitted that it would have taken Comcast itself several days to come up with even an imperfect list of systems.¹⁸⁵

76. MASN reasonably relied upon the list of cable systems that Comcast prepared. Indeed, Comcast's own witness requested a list of its Comcast systems in order to provide sworn testimony in this proceeding, and like MASN, reasonably relied upon Comcast to provide him with an accurate list of the Comcast systems that he had requested.¹⁸⁶

¹⁸¹ See MASN Ex. 237, ¶¶ 10, 16 (Gluck Written Test.); MASN Ex. 236, ¶¶ 31-32 (Wyche Written Test.).

¹⁸² See MASN Ex. 237, ¶¶ 10, 16 (Gluck Written Test.); MASN Ex. 236, ¶¶ 31-32 (Wyche Written Test.).

¹⁸³ See MASN Ex. 236, ¶ 39 (Wyche Written Test.); see MASN Ex. 237, ¶¶ 31-32 (Gluck Written Test.).

¹⁸⁴ See MASN Ex. 236, ¶¶ 42-43 (Wyche Written Test.).

¹⁸⁵ See Tr. at 6970, 6972 (testifying that it would have taken Comcast a "few days" to prepare an "imperfect" list of systems and that it took a year to create a list with MASN) (Bond Test.).

¹⁸⁶ See Tr. at 7076-78 ("Q: . . . You relied upon this document in forming your opinion in this case, correct? A: Yes, I did. Q: And that's both the expert report that you prepared and your testimony today, correct? A: That is correct. Q: And you take your opinions very seriously, don't you, sir? A: Of course, I do. Q: You make it under oath? A: Of course. Q: And it's your reputation on the line? A: Of course.") (Orszag Test.).

Comcast's Claims of Low Demand

77. Comcast never mentioned low consumer demand for MASN in any of the Foreclosed Areas during the carriage negotiations.¹⁸⁷

78. [REDACTED] Less than three months before the carriage negotiations in August 2006, [REDACTED]

79. In preparing Schedule A, which excluded the Foreclosed Areas, Comcast never analyzed or studied consumer demand for MASN.¹⁸⁹ Consumer demand was not one of the three criteria Comcast used to create Schedule A. There is no evidence that Comcast even discussed consumer demand in deciding which systems to exclude from Schedule A.

80. In each of the Foreclosed Areas, Comcast's most significant competitors – DirecTV and DISH¹⁹⁰ – carry MASN at the same prices, terms, and conditions that have been

¹⁸⁷ See Tr. at 6933-34 (“Q: There was no specific price negotiation with respect to Harrisburg, correct? A: Right. Q: There was no specific price negotiation with respect to Roanoke-Lynchburg, correct? A: Yes. Q: There was no specific price negotiation with respect to Tri-Cities, correct? A: Yes. . . . Q: There was no discussion of demand in Harrisburg in July and August of 2006, correct? A: Yes. Q: There was no discussion of demand in the Roanoke-Lynchburg area in July-August, 2006, correct? A: Correct. Q: There was no discussion of demand in the Tri-Cities area in July-August of 2006, correct? A: Correct.”) (Bond Test.); see also MASN Ex. 236, ¶ 11 (“in none of my prior negotiations in 2005 and 2006 did Comcast or its representatives ever mention allegedly low demand for MASN’s programming in the Harrisburg, Roanoke-Lynchburg, or Tri-Cities DMAs”) (Wyche Written Test.); Tr. at 6068 (“Q: When was the first time you heard Comcast say to you that there was low demand in these regions we’re talking about, the Harrisburg, the Roanoke, Lynchburg and the Tri-Cities DMAs? A: You know, I’ll be candid. I don’t recall them ever saying that directly to me. So I don’t ever recall it being said to me.”) (Gluck Test.).

¹⁸⁸ See MASN Ex. 99, at 20-23.

¹⁸⁹ See Tr. at 6550-51 (“Q: But you did no studies on consumer demand, did you, sir? A: Based on my experience. . . . Q: You did not [do a] demand study, correct? A: That’s correct.”) (Ortman Test.).

¹⁹⁰ See Tr. at 7168 (“Q: Isn’t it true that DIRECTV and Dish are Comcast’s largest actual competitors? A: They are their largest direct competitors for subscribers, yes. Q: And that is true within the three regions we’re talking about today, correct? A: Yes, that is true.”) (Orszag Test.); see also Tr. at 6863 (“Q: And Comcast’s competitors include DirecTV and Dish. A: Yes.”) (Bond Test.); Tr. at 6479 (Ortman Test.).

offered to Comcast. Verizon – an emerging competitor to Comcast¹⁹¹ – also carries MASN in the Harrisburg and Roanoke-Lynchburg DMAs. In sum, MVPDs that serve approximately [REDACTED] percent of the subscribers in each of these regions (excluding Comcast) carry MASN. These are arm's-length market transactions by Comcast's competitors that, unlike Comcast, have no affiliated RSNs to protect or otherwise benefit. There is no evidence that each of these MVPDs has incorrectly measured consumer demand for MASN in the Foreclosed Areas, or has agreed to pay too much for MASN in these areas.

81. Nielsen ratings also show a demand for MASN in the Harrisburg and Roanoke-Lynchburg DMAs in the two years preceding the 2006 carriage negotiations between MASN and Comcast. (There is no record evidence of Nielsen ratings for the Tri-Cities DMA.) These ratings measure viewership in a DMA. Mr. Ortman admitted that a rating of [REDACTED] or higher would be very high.¹⁹² In the Harrisburg DMA, cable ratings for Orioles games were [REDACTED] in 2004 and [REDACTED] in 2005;¹⁹³ they were even higher [REDACTED] in 2004 and [REDACTED] in 2005) for broadcast stations.¹⁹⁴ In the Roanoke-Lynchburg DMA, cable ratings for Orioles games were [REDACTED] in 2004 and [REDACTED] in 2005,¹⁹⁵ which also reflect a strong demand.¹⁹⁶ These ratings, which are for the Orioles only, understate the demand for MASN. This is because MASN also telecasts Nationals games, for which there was no evidence of Nielsen ratings. As set forth above, however, [REDACTED]

[REDACTED] It is therefore evident that Comcast believed that Nationals games would substantially increase the demand for MASN.

82. Notably, the studies that Comcast prepared during this litigation also reflect a demand for MASN in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs. In two surveys, Comcast asked people to "rate [their] interest" in a number of MLB teams on a scale of 0-5, with 0 being "[n]ot at all [i]nterested" and 5 being "[v]ery interested."¹⁹⁸ Ratings of 4 and 5 were aggregated in a "Top 2 Box Summary";¹⁹⁹ ratings of 2 and 3 were aggregated in a "Middle

¹⁹¹ See Tr. at 6863-64 ("Q: And Comcast's competitors also include the telephone companies, like Verizon FiOS. A: Yes.") (Bond Test.); Tr. at 6479-80 (Ortman Test.).

¹⁹² See Tr. at 6559 ("Q: Okay. Now is it a fact[] that a rating of [REDACTED] or better would get your attention? A: It would get my attention. Q: And anything over a [REDACTED] would also get your attention? A: It certainly would.") (Ortman Test.).

¹⁹³ See MASN Ex. 82, at 78 (2004 ratings); MASN Ex. 84, at 77 (2005 ratings).

¹⁹⁴ See MASN Ex. 82, at 32 (2004 ratings); MASN Ex. 84, at 31 (2005 ratings).

¹⁹⁵ See MASN Ex. 82, at 79 (2004 ratings); MASN Ex. 84, at 78 (2005 ratings).

¹⁹⁶ See Tr. at 5710 ("So if you are doing a [REDACTED] any cable industry expert will tell you that that is a really good number.") (Cuddihy Test.).

¹⁹⁷ See MASN Ex. 91, at 4.

¹⁹⁸ Comcast Ex. 78, at 78-21 – 78-22, Table 18; Comcast Ex. 79, at 79-19 – 79-20, Table 16.

¹⁹⁹ MASN Ex. 351 (demonstrative; citing source data).

Box Summary.”²⁰⁰ In all three DMAs, consumers rated their interest in the Orioles or Nationals (or both) among the five highest rated MLB teams. In the Top 2 Box Summary, the Orioles or Nationals were rated #2 and #4 in Roanoke-Lynchburg; #2 and #4 in Tri-Cities; and #3 and #5 in Harrisburg.²⁰¹ In the Middle Box Summary, the Orioles or Nationals were rated #1 in Harrisburg; #1 and #3 in Roanoke-Lynchburg; and #3 in Tri-Cities.²⁰²

83. Objective measures of demand understate the current demand for MASN in the Foreclosed Areas. The interest of sports fans waxes and wanes upon their ability to follow a team closely over the course of a season, including being able to watch them on television.²⁰³ Comcast’s refusal to carry MASN to hundreds of thousands of subscribers in these markets has reduced fan interest in the Orioles and Nationals in the Foreclosed Areas and therefore artificially reduced demand for MASN.²⁰⁴

Comcast’s Claims of High Cost

84. Comcast never mentioned that MASN was too expensive in any of the Foreclosed Areas during the carriage negotiations in August 2006.²⁰⁵

85. The prices charged by MASN for carriage in the Foreclosed Areas are the same as the prices paid by every other MVPD that carries MASN in those areas, including Comcast’s major competitors. This price is the same – [REDACTED] – in the three largest areas of foreclosure, Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs.²⁰⁶ This price is considerably less [REDACTED] than the prices charged for MASN in the Baltimore and Washington, D.C. areas. There is no evidence that each of these other major MVPDs were

²⁰⁰ MASN Ex. 352 (demonstrative; citing source data).

²⁰¹ See MASN Ex. 351 (demonstrative; citing source data).

²⁰² See MASN Ex. 352 (demonstrative; citing source data).

²⁰³ See MASN Ex. 235, ¶ 25 (Cuddihy Written Test.).

²⁰⁴ Tr. at 7209 (“Q: And would you agree with me that seeing a game in a particular region tends to build fan loyalty? A: Seeing a fan? I’m sorry. Q: I’m sorry, seeing a game broadcast in a particular region tends to build fan loyalty in that – A: I’ll agree that it tends to, yes. Q: And losing it, losing those eyeballs in a particular pocket risks losing those fans, true? A: Potentially, yes.”) (Orszag Test.).

²⁰⁵ See Tr. at 6933-34 (“Q: There was no specific price negotiation with respect to Harrisburg, correct? A: Right. Q: There was no specific price negotiation with respect to Roanoke-Lynchburg, correct? A: Yes. Q: There was no specific price negotiation with respect to Tri-Cities, correct? A: Yes. . . . Q: There was no discussion of demand in Harrisburg in July and August of 2006, correct? A: Yes. Q: There was no discussion of demand in the Roanoke-Lynchburg area in July-August, 2006, correct? A: Correct. Q: There was no discussion of demand in the Tri-Cities area in July-August of 2006, correct? A: Correct.”) (Orszag Test.).

²⁰⁶ See MASN Ex. 238, ¶ 53, Table 2 (Singer Written Test.).

²⁰⁷ See MASN Ex. 238, ¶ 52, Table 1 (Singer Written Test.).

mistaken to pay these prices for MASN in light of the market demand in these regions. As Dr. Singer explained, “if the [REDACTED] was considered inappropriately high for MASN’s programming in the contested areas, why in the world is everyone paying it?”²⁰⁸

86. This price – [REDACTED] – also [REDACTED] to the prices paid by Comcast to carry other RSNs, not only in the mid-Atlantic region, but also throughout the rest of the country. It is common in the industry to value a RSN by using a normalized metric that accounts for the number of professional baseball, basketball, and hockey games it telecasts on an annual basis.²⁰⁹ This measure is called the per-subscriber per-major-pro-event rate (“PSPPE”). The PSPPE rate is calculated by dividing an RSN’s annual per-subscriber license fee by the total of live major professional sporting events that the RSN televises each year. Comcast’s internal documents [REDACTED].²¹⁰ MASN’s PSPPE rate is [REDACTED] than the rates of other RSNs that Comcast willingly carries in the Foreclosed Areas – including Comcast’s affiliated RSNs, which charge [REDACTED] on a PSPPE basis than MASN.²¹¹ The PSPPE analysis confirms that MASN’s price in the Foreclosed Areas is reasonable.

87. Another economic analysis likewise confirms that MASN’s price in the Foreclosed Areas is appropriate. Dr. Singer performed a regression analysis to predict the price for MASN based on numerous explanatory variables (i.e., price, total professional games telecast, distance from venue, team performance).²¹² This analysis showed that the price for MASN is [REDACTED] than the price that Comcast voluntarily pays for comparable RSN programming across the nation.²¹³

Comcast’s Claims of Low Capacity

88. Mr. Ortman testified that Comcast systems with at least 550 MHz of capacity could carry MASN without issue.²¹⁴ He was the most knowledgeable witness that Comcast

²⁰⁸ Tr. at 6420 (Singer Test.).

²⁰⁹ See MASN Ex. 236, ¶ 16 (Wyche Written Test.).

²¹⁰ See MASN Ex. 138, at 6 [REDACTED]
[REDACTED]

²¹¹ See MASN Ex. 238, ¶¶ 57-61 (Singer Written Test.).

²¹² See MASN Ex. 238, ¶¶ 63-79 (Singer Written Test.).

²¹³ See MASN Ex. 238, ¶ 79 (Singer Written Test.).

²¹⁴ See Tr. at 6596 (“JUDGE SIPPEL: Had to be a minimum of 550. Right? THE WITNESS: Correct.”) (Ortman Test.); see also Tr. at 6653 (“Q: Is it a fact that any system with greater than 550 megahertz would not create a capacity issue today? A: It shouldn’t. Greater than 550 should be – greater than 750 should be fine.”) (Ortman Test.); Tr. at 6654 (“Q: – a Comcast system with 550 megahertz would not have a bandwidth issue in carrying MASN? A: It would be a challenge, but it would not be an issue. It certainly could be accomplished, as it was in ’06.”) (Ortman Test.).

offered on this issue.²¹⁵ The vast majority of systems in the Foreclosed Areas have at least 550 MHz of capacity.²¹⁶ Virtually all of these systems, moreover, carry a Comcast-affiliated RSN.²¹⁷

MASN's Ability To Compete Fairly

89. Comcast's refusal to carry MASN in the Foreclosed Areas will cause MASN to lose about [REDACTED] in license revenues, as well as millions more in advertising revenues.²¹⁸

90. Comcast is the major MVPD in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs. Within each of these specific regions, it is more difficult for MASN to compete for advertisers and viewers given its inability to reach these large numbers of subscribers.

91. An RSN with more coverage has a material advantage in obtaining programming rights over an RSN with less territory. MASN must pay more money to compensate a sports team for the coverage gaps that Comcast has created within its footprint.²¹⁹ Internal documents show [REDACTED] which was motivation for Comcast to reduce MASN's ability to compete effectively by creating coverage gaps.²²⁰

92. MASN competes with Comcast for programming rights. MASN has competed with Comcast's affiliated RSN for rights to telecast certain Washington Redskins content, and MASN lost that contest.²²¹ Similarly, in order to win the rights to the Baltimore Ravens (over Comcast), MASN "had to pay a high price" because it was "not carried by Comcast."²²² The

²¹⁵ Tr. at 6926 ("Q: You are not an expert on bandwidth, are you? A: No. Q: Mr. Ortman is an expert on bandwidth, isn't he? A: Yes, he knows a lot more about it than me. . . . Q: So he understands more precisely what each system's bandwidth constraints are than you do, correct? A: Yes.") (Bond Test.).

²¹⁶ See Joint Ex. 1.

²¹⁷ See Joint Ex. 1.

²¹⁸ See Tr. at 6433 ("we get to [REDACTED] of lost licensing revenue every two years, and this is a 10-year contract") (Singer Test.).

²¹⁹ See Tr. at 7209 ("You have to bid more to compensate the sports team for what you can't give them [for coverage gaps], correct? A: All other things being equal, yes.") (Orszag Test.); Tr. at 6434-35 (Singer Test.).

²²⁰ See MASN Ex. 115, at 2.

²²¹ See MASN Ex. 235, ¶ 39 ("MASN's limited penetration was cited as a problem during negotiations I undertook with the Washington Redskins in 2008 and 2009 for programming rights. Comcast ultimately won those rights.") (Cuddihy Written Test.).

²²² Tr. at 5778 (Cuddihy Test.).

coverage gaps created by Comcast's carriage decisions have been a concern in MASN's relationship with the Ravens.²²³

93. MASN also competes with Comcast for advertisers. An RSN with more coverage has an advantage in obtaining advertising over an RSN with less coverage.²²⁴ The coverage gaps that Comcast has created in MASN's footprint cause MASN to be less attractive to advertisers. MASN has pointed to two significant examples of lost advertising from coverage: [REDACTED]²²⁵. Any coverage gaps, moreover, reduce advertising revenues.²²⁶

CONCLUSIONS OF LAW

I. MASN AND COMCAST'S RSNs ARE SIMILARLY SITUATED

94. A threshold question in program-carriage cases alleging discrimination is whether the affiliated and unaffiliated programming at issue are "similarly situated."²²⁷ The Supreme Court has held that discrimination involves "a comparison of substantially similar entities."²²⁸ MASN has carried its burden of proving that it is similarly situated to Comcast's regional sports networks, CSN-MA and CSN-Philly.²²⁹

95. MASN and Comcast's affiliated networks are RSNs that focus on carrying the live games of major professional teams in overlapping geographic areas, and they compete for sports programming rights, advertisers, and subscribers.²³⁰ MASN's expert, Dr. Singer, testified that "[b]y almost any metric, MASN, CSN-MA, and CSN-Philly are similarly situated in the contested areas. All three are RSNs that operate in largely the same areas. All three seek to

²²³ See Tr. at 5778 (Cuddihy Test.); Tr. at 6327-28 (discussing evidence that "the Baltimore Ravens are citing these gaps in coverage" as a "reason[] why they don't want to do business with us") (Singer Test.).

²²⁴ See MASN Ex. 238, at 22, n.39 (Singer Written Test.).

²²⁵ See MASN Ex. 235, ¶ 42 (Cuddihy Written Test.).

²²⁶ MASN Ex. 238, at 22, n.39 ("Because advertising fees are denominated in terms of number of viewers reached, MASN realizes a loss in advertising revenues from existing advertising clients as a result of Comcast's exclusionary conduct in the contested areas.") (Singer Written Test.).

²²⁷ See HDO ¶ 108; see Order on Review, *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*, 23 FCC Rcd 15783, ¶ 29 (MB 2008) ("TWC Order").

²²⁸ *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

²²⁹ See HDO ¶ 7 (explaining that each complainant had "the burden of proof" with respect to each element of the *prima facie* case and that each complainant carried that burden); *id.* ¶ 90 ("After reviewing the pleadings and supporting documentation filed by the parties, we find that MASN has established a *prima facie* case under Section 76.1301(c)."); *id.* ¶ 108 (discussing MASN's proffer with respect to the similarly situated element).

²³⁰ See *supra* Findings of Fact ¶¶ 12-14, 49-52 ("FOF").

appeal principally to the same demographic: men aged 24 to 49. MASN and Comcast's affiliated RSNs compete directly with MASN for the same type of regional sports programming."²³¹ Comcast has not provided any contrary testimony; indeed, Comcast did not dispute this element of MASN's case in its Answer²³² and set forth no proposed findings of fact on this issue.²³³ Comcast's expert admitted MASN and CSN-MA are "close competitors" for sports programming.²³⁴

96. Comcast has argued that MASN has failed to prove that fan demand for its programming overlaps with fan demand for the programming of Comcast's affiliated RSNs.²³⁵ MASN responds that the relevant question is whether these networks compete to acquire the same programming in the first instance. MASN has the better of the argument. The undisputed evidence shows that MASN and Comcast's RSNs compete for programming, and that this competition drives rivalry between the networks.²³⁶ Comcast's own RSNs previously carried the Orioles, bid aggressively for the Nationals, and would presumably be carrying both teams today but for MASN's existence in the market. From Comcast's perspective, therefore, MASN and Comcast's own RSNs are similarly situated.

II. MASN HAS PROVEN THAT COMCAST HAS TREATED MASN AND ITS AFFILIATED RSNs DISPARATELY

97. A second element of a program-carriage complaint is disparate treatment between affiliated and unaffiliated networks with respect to the selection, terms, or conditions of carriage. MASN has proven this element of its case-in-chief.

98. In each of the Foreclosed Areas, Comcast carries affiliated RSNs to 100 percent of Comcast subscribers, whereas it carries MASN to zero percent of Comcast subscribers. Furthermore, across MASN's, CSN-MA's, and CSN-Philly's television territories, Comcast carries an affiliated RSN to nearly 100 percent of its subscribers, but Comcast distributes MASN to only 87 percent of Comcast's subscribers.

99. Comcast has submitted no reliable or relevant evidence to dispute these findings. It has instead attempted to defend this differential treatment as unrelated to MASN's non-

²³¹ MASN Ex. 238, ¶ 6 (Singer Written Test.).

²³² See *HDO* ¶ 108 ("Comcast has not attempted to demonstrate that MASN, CSN-MA, and CSN-P[hilly] are not similarly situated.").

²³³ Comcast PFOF ¶¶ 170-171 (not pointing to any record evidence on this issue).

²³⁴ See *supra* FOF ¶ 50.

²³⁵ Proposed Reply Findings of Fact and Conclusions of Law of Comcast Corporation ¶ 86 ("Comcast PRFOF").

²³⁶ See *supra* FOF ¶¶ 49-50; see also Tr. at 6152-54 (Singer Test.); Tr. at 5591 ("We compete with those networks [CSN-MA and CSN-Philly] on a daily basis in a lot of ways in terms of programming and advertising and viewership and ratings. There's no doubt we compete with [CSN-MA and CSN-Philly].") (Cuddihy Test.).

affiliation with the Comcast corporate family. As discussed below, the evidence establishes that Comcast's differential treatment is motivated by affiliation and non-affiliation.

III. MASN HAS PROVEN THAT COMCAST HAS ENGAGED IN DISCRIMINATION ON THE BASIS OF AFFILIATION

100. The parties have argued over the proper legal standard for assessing affiliation-based discrimination. MASN argues that a burden-shifting framework embraced by the Media Bureau in the *TWC Order* best implements the program-carriage prohibition on discrimination. Comcast, in turn, argues that affiliation-based discrimination should be determined on the basis of the *McDonnell-Douglas* framework used principally in employment-discrimination contexts.

101. The Presiding Judge finds MASN's legal arguments more persuasive. A burden-shifting framework is well-grounded in Commission precedent. The Commission has used this framework in the program-access context,²³⁷ in adjudicating claims of discrimination by telephone companies,²³⁸ and in determining whether Internet access service providers' network management practices unreasonably discriminate against unaffiliated interests.²³⁹ Using a burden-shifting framework to identify or smoke out affiliation-based discrimination is appropriate. In light of the strong incentives of vertically integrated cable companies to favor the interests of affiliated networks and the informational asymmetry between cable operators and video programmers, if a vertically integrated cable company cannot establish a legitimate, non-discriminatory reason for disparate treatment of affiliated and unaffiliated networks, the Commission can reasonably conclude that such conduct is motivated by affiliation.²⁴⁰

²³⁷ See, e.g., Memorandum Opinion and Order, *Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, ¶¶ 14, 15 (CSB 1998); Memorandum Opinion and Order, *CellularVision of New York, L.P. v. SportsChannel Assocs.*, 10 FCC Rcd 9273, ¶ 23 (CSB 1995); Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, ¶ 56 (1998).

²³⁸ See, e.g., Report and Order, *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, ¶ 291 n.782 (1997) ("once a complainant alleging a violation establishes that the services are like and that discrimination exists between them, the burden shifts to the defendant carrier to show that the discrimination is justified and, therefore, not unreasonable"); Memorandum Opinion and Order, *Beehive Tel., Inc. v. Bell Operating Cos.*, 10 FCC Rcd 10562, ¶ 27 (1995) ("Once a *prima facie* showing of like services and discrimination has been made, the defendant has the burden of establishing that the discrimination is justified and, therefore, not unreasonable."), *adopted and reaffirmed on remand*, Memorandum Opinion and Order, *Beehive Tel., Inc. v. Bell Operating Cos.*, 12 FCC Rcd 17930 (1997) (attaching original order).

²³⁹ See Memorandum Opinion and Order, *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13028, ¶ 43 (2008).

²⁴⁰ See, e.g., *National Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 130-31 (2d Cir. 2001). In cases of race- or gender-based discrimination, by contrast, there is typically no economic incentive to discriminate. Just the opposite: employers have a strong economic incentive to hire the most qualified applicant, regardless of race or gender. Discrimination is

102. The issue regarding the appropriate legal standard is ultimately immaterial, however. Under even the employment discrimination standard requested by Comcast, MASN established discrimination on the basis of affiliation in violation of 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c). The Presiding Judge will accordingly apply Comcast's proposed legal standard. Discussion of the facts under that standard also establishes Comcast's failure to offer a non-discriminatory basis for its decision not to carry MASN in the Foreclosed Areas. This conclusion is supported by abundant record evidence, as set forth below, including (a) direct evidence of Comcast's disparate treatment; (b) Comcast's motivation and bias to harm MASN; and (c) the pretextual nature of Comcast's defenses. Comcast has failed to defend its differential treatment as the result of a legitimate, non-discriminatory justification.²⁴¹

103. It is undisputed that MASN has requested carriage in the Foreclosed Areas from 2007 until the present, and that Comcast has refused. Comcast claims that MASN has failed to introduce proof that Comcast's decision to deny carriage in 2007 was discriminatory. Not so. Both law and logic teach that past acts can evidence the present intent to perform a discriminatory act.²⁴² Under the employment-based discrimination standard urged by Comcast, for example, an employer's long history of discriminating against women from 2004 to 2006 is relevant proof that his refusal to hire female workers in 2007 was based on discrimination.

A. Direct Evidence of Affiliation-Based Discrimination

104. The direct evidence of Comcast's discrimination is sufficient, without more, to support a finding of discrimination. *First*, Comcast has admitted that its affiliated RSNs receive

thus economically irrational. Strong evidence of intentional discrimination – whether direct or circumstantial – is necessary to overcome the baseline presumption that employers will act rationally to maximize their economic interests. Here, the economic incentives are reversed: Congress and the Commission have made repeated findings that vertically integrated cable companies – and Comcast in particular – face inherent and rational economic pressures to discriminate by favoring the economic interests of affiliated networks over those of similarly situated unaffiliated networks. *See, e.g., Adelphia Order* ¶¶ 189-190. Those differences render employment discrimination case law a poor model for carriage discrimination.

²⁴¹ Because MASN prevails under Comcast's proposed legal standard, it follows *a fortiori* that MASN also prevails under the Media Bureau's framework. The evidence establishes that MASN and Comcast's RSNs are similarly situated; that Comcast has treated MASN and its affiliated RSNs disparately; that this disparate treatment unreasonably restrains Comcast's ability to compete fairly; and that Comcast has not carried its burden of proving a legitimate, non-discriminatory reason for the difference in treatment.

²⁴² *See Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1112 (7th Cir. 1998) ("evidence surrounding a previous employment decision such as a demotion would be relevant to and probative of an employer's intent in a subsequent termination decision"); *Little v. National Broad. Co.*, 210 F. Supp. 2d 330, 379 (S.D.N.Y. 2002) (evidence of past conduct, "even if it occurred well before the statute of limitations, may support an inference of racially discriminatory intent").

preferential treatment. The President of Comcast Cable, Steve Burke, conceded that its own networks “get treated like siblings as opposed to like strangers” and receive a “different level of scrutiny.”²⁴³ Under the employment-based discrimination standard urged by Comcast, this admission would conclusively prove liability. No employer could hold male applicants to a “different level of scrutiny” than female ones, or have male workers “treated like siblings as opposed to like strangers,” as Mr. Burke has stated. Notably, Comcast offers no explanation or justification whatsoever for these statements, which are discriminatory on their face.

105. *Second*, Comcast’s internal documents confirm that Mr. Burke’s admissions of disparate treatment reflect Comcast’s policy and practice with respect to unaffiliated RSNs. Comcast uses [REDACTED] calculations when considering whether to carry affiliated and unaffiliated networks – a standard that ensures systematic discrimination because an affiliated network will always be favored over a similarly situated unaffiliated network.²⁴⁴ In fact, Comcast’s expert witness endorsed this discriminatory approach – and expressly disagreed with a standard that would permit independent RSNs to compete on a level playing field.²⁴⁵ Under the employment-based discrimination standard urged by Comcast, this fact would conclusively prove liability. No employer could make hiring decisions based on calculations [REDACTED] [REDACTED]. Notably, Comcast offers no explanation or justification whatsoever for these [REDACTED] calculations, which are discriminatory on their face.

106. Other documents confirm Comcast's discriminatory favoritism of its affiliated RSNs. In May 2006, for example, Comcast prepared an [REDACTED]

[REDACTED]

This document is conspicuous proof of a double-standard:

[REDACTED] There would be no basis for this difference unless Comcast treated its affiliated RSNs "like siblings as opposed to like strangers." Notably, Comcast offers no explanation or justification whatsoever for this documented double-standard, which is discriminatory on its face.

107. *Third*, Mr. Burke's admissions of disparate treatment explain why Comcast treats its affiliated RSNs more favorably than MASN. It is undisputed that Comcast had refused to carry MASN before negotiating a carriage agreement, but that Comcast has carried its affiliated RSNs [REDACTED] for years. Comcast likewise does not dispute that its affiliated RSNs have received more preferential treatment with regard to split-feed advertising.²⁴⁶ Under the employment-based discrimination standard urged by Comcast, these facts would conclusively prove liability. No employer could require female employees to sign employment contracts, [REDACTED] Nor could an employer

²⁴³ See *supra* FOF ¶ 27.

²⁴⁴ See *supra* FOF ¶ 28.

²⁴⁵ See *supra* FOF ¶ 28; Tr. at 7148 (Orszag Test.).

²⁴⁶ See *supra* FOF ¶ 40.

prohibit women from telecommuting by arguing that the employment contract did not permit it, while permitting men [REDACTED] to do so willy-nilly. Notably, Comcast offers no explanation or justification whatsoever for these material differences in the “terms” and “conditions” of carriage, which are discriminatory on their face.

108. *Fourth*, Mr. Burke’s admissions of disparate treatment and Comcast’s [REDACTED] calculations explain why Comcast affords its affiliated RSNs substantially more carriage than it affords to MASN. It is undisputed that, in each of the Foreclosed Areas, Comcast carries an affiliated RSN to *100 percent* of Comcast’s subscribers. But in each of the Foreclosed Areas, Comcast has refused to carry MASN to *any* of its subscribers.²⁴⁷ Not only is this disparate treatment stark in each of those Foreclosed Areas, but it also extends over MASN’s geographic footprint. It is undisputed that Comcast carries an affiliated RSN to more than 99 percent of subscribers across MASN’s footprint, while Comcast affords MASN much less carriage (only 87 percent) to these identical subscribers in these identical areas.²⁴⁸ While Comcast offers (implausible) explanations for this disparate treatment, which are discussed below, there is no dispute that a significant disparity exists. This disparity squares perfectly with Mr. Burke’s admissions of a “different level of scrutiny” and Comcast’s [REDACTED] calculations, both of which unambiguously tilt the scales in favor of carrying Comcast’s affiliated RSNs.

109. Internal Comcast documents, like Mr. Burke’s admissions, show that this disparity in coverage is the product of intentional differential treatment. In a presentation regarding “Comcast Regional Sports Networks,” Comcast stated that [REDACTED]

[REDACTED] This document evidences that Comcast provides more favorable treatment to its affiliated RSNs; otherwise, there would be no basis for Comcast [REDACTED]

[REDACTED] Comcast’s RSNs depend, in other words, on the favorable treatment provided by Comcast’s distribution arm to succeed. Furthermore, internal documents establish that Comcast has an [REDACTED]

[REDACTED] Unaffiliated RSNs in Comcast’s view, therefore, must be marginalized, lest they become threats to Comcast RSNs’ [REDACTED]

Notably, Comcast offers no explanation or justification whatsoever for these statements.

110. *Fifth*, the evidence establishes that Comcast has expressly considered issues of affiliation and non-affiliation in reaching carriage decisions regarding MASN. Comcast devised a plan to “carve off” the number of subscribers it would provide to MASN. Internal Comcast documents show that Mr. Bond – for the first time – asked his subordinates to determine “the

²⁴⁷ See Joint Ex. 1.

²⁴⁸ See *supra* FOF ¶ 26.

²⁴⁹ See *supra* FOF ¶ 44.

²⁵⁰ See *supra* FOF ¶ 45.

total number of [subscribers] we would be giving [MASN]” and “what systems on the periphery [of MASN’s footprint] we can carve off” *the day after* Comcast [REDACTED]

[REDACTED] Notably, Comcast offers no explanation whatsoever for the timing and sequence of these actions, much less for the actions themselves. Comcast points to testimony where Mr. Bond said that he did not intend to discriminate against MASN, but offers no explanation of why Mr. Bond wanted to “carve off” subscribers in the first place. Nor did Comcast provide a legitimate basis for Mr. Bond to instruct his staff to locate systems to exclude for MASN – without providing any reason to do so or even a basis for deciding which systems should be excluded. Mr. Bond, for example, did not instruct his staff to determine which systems should be excluded based on low demand or cost or bandwidth, the defenses that Comcast has pressed in this proceeding. Based on the record evidence, it is reasonable to infer that he did so because he was motivated by the [REDACTED] [REDACTED] that he had received from high-ranking Comcast officials the day before.

111. *Sixth*, Comcast is the only major MVPD to deny MASN carriage in the Foreclosed Areas. Comcast’s major competitors, DISH, DirecTV, and Verizon, carry MASN in these regions on the same prices, terms, and conditions as MASN has offered to Comcast.²⁵² The record evidence shows only one difference between these competitors and Comcast: Comcast has an affiliated RSN, whereas its competitors do not. Although Comcast points to other MVPDs that do not carry MASN in certain of the Foreclosed Areas, these MVPDs are far smaller than Comcast and its major competitors, and, therefore, do not provide a comparable basis for comparison. Notably, Comcast does not claim that its major competitors have been mistaken to carry MASN in the Foreclosed Areas. MASN’s expert testimony on this question was reliable and credible. Comcast’s expert provided no basis for discarding the decisions of DISH and DirecTV or assigning disproportionate weight to the decisions of exceedingly small cable operators.

B. MASN Has Adduced Substantial Evidence of Comcast’s Bias Against MASN and Its Motivation To Discriminate Against Unaffiliated RSNs

112. It is settled that past acts can evidence present discriminatory intent.²⁵³ Under the employment-based discrimination standard urged by Comcast, for example, an employer’s stated desire to hire Harvard graduates in the past would be proof of discrimination if he refused to hire every female Harvard graduate who applied for a job. Similarly, an employer’s past discrimination against female candidates would support an inference that current disparate employment decisions regarding females are also motivated by discrimination. Although Comcast urges that all of its prior actions are irrelevant, there is no basis to ignore such relevant conduct. Several past acts show Comcast’s bias against MASN. Such evidence of bias is relevant to prove Comcast’s motive to discriminate against MASN and that such a motive drove Comcast’s refusal to carry MASN in the Foreclosed Areas in 2007 and thereafter.

²⁵¹ See *supra* FOF ¶ 33.

²⁵² See *supra* FOF ¶¶ 19, 80, 85.

²⁵³ See *Fortier*, 161 F.3d at 1112; *Little*, 210 F. Supp. 2d at 379.

113. Comcast's bias is most evident in its refusal to carry MASN at all for nearly two years – even in MASN's core markets. This foreclosure was extraordinary not only because Comcast was the only major MVPD to do so, but also because Comcast had aggressively sought MASN's core programming for itself. Comcast had bid for the rights to the Nationals, and went so far as to publicly appeal the loss of those rights to MLB and, indeed, to Congress. Comcast also sued for the rights to the Orioles.²⁵⁴ Having sought these programming rights with such vigor and tenacity, there is no question that Comcast viewed them as valuable. The fact that Comcast then refused to do business with MASN for nearly two years was not a rational and legitimate business decision (an anti-competitive desire to ruin or undermine MASN may be rational from Comcast's pure economic perspective but it is certainly unlawful and illegitimate). Rather, it demonstrates Comcast's bias against MASN. Notably, Comcast does not even attempt to defend this foreclosure, but rather urges that it is irrelevant.

114. Other acts likewise display Comcast's bias against MASN, and its desire to undermine MASN's threat to the preeminence of Comcast's affiliated RSNs in the mid-Atlantic region. Comcast has taken the extraordinary step of sending letters to other MVPDs threatening them if they carried MASN.²⁵⁵ Even after Comcast began carrying MASN in certain areas, it took the further extraordinary step of sending letters to subscribers blaming MASN for a rate increase.²⁵⁶ Comcast's fact witnesses conceded that this conduct was unprecedented.

115. It is reasonable to infer that Comcast's bias against MASN remained in force in 2006, when it created the Foreclosed Areas, and in 2007, when it expressly denied MASN's request for carriage in the Foreclosed Areas. Indeed, Comcast has conceded for the first time in this proceeding that it finally decided to carry MASN in 2006 only after receiving "heavy pressure" from the Commission.²⁵⁷

116. Separate and apart from Comcast's bias against MASN are its powerful incentives to favor its affiliated RSNs and, therefore, to discriminate against MASN. *First*, Comcast benefits when its affiliated RSNs are profitable. Comcast is unambiguously better off paying a dollar to CSN-MA – which is simply an internal transfer of money – than it is paying a dollar to an independent RSN like MASN. *Second*,

[REDACTED] In sum, Comcast has every rational business incentive to promote its affiliated RSNs at the expense of independent RSNs like MASN. Those strong incentives, in the face of Comcast's inability to set forth a coherent, consistent, and credible explanation for its refusal to carry MASN, coupled with Comcast's failure to put in place even rudimentary safeguards of basic training to prevent affiliation-based discrimination, support an inference of discrimination in this case.

²⁵⁴ See *supra* FOF ¶¶ 53-59.

²⁵⁵ See *supra* FOF ¶ 58.

²⁵⁶ See *supra* FOF ¶ 37.

²⁵⁷ Comcast PFOF (Summary), at 2.

C. Comcast’s Proffered Defenses Are Implausible and Pretextual, Independently Supporting a Conclusion of Affiliation-Based Discrimination

117. It is settled that the unreasonableness of a justification, like a blown alibi, can support a finding of discrimination.²⁵⁸ Comcast’s explanations for its foreclosure of MASN have shifted and varied over time, raising the inference of pretext.²⁵⁹ Those explanations, moreover, simply do not hold water.

118. Comcast’s principal justification has been to claim a low demand for MASN in the Foreclosed Areas. This claim is unconvincing for numerous reasons. *First*, it is undisputed that Comcast never mentioned low demand as an issue during the carriage negotiations with MASN in August 2006.²⁶⁰ It is difficult to suppose that Comcast was so concerned with the low demand for MASN that it would not carry MASN in the Foreclosed Areas, but that it decided never to raise this issue with MASN. To the contrary, if Comcast was genuinely motivated by concerns of the purportedly low demand for MASN in specific regions, it at least would have sought to negotiate a lower price for carriage in these areas – just as other MVPDs, like DirecTV, have done during carriage negotiations with MASN. That this issue was raised first in 2007 suggests that the justification was invented after the fact.

119. *Second*, [REDACTED]
[REDACTED] In May 2006, [REDACTED]
[REDACTED] Comcast correctly notes that this [REDACTED]
[REDACTED] These distinctions are immaterial; it is
compelling that Comcast would specifically [REDACTED]
[REDACTED] Given this
document, it is inconsistent for Comcast to claim that there is low demand for MASN in the Harrisburg, Roanoke-Lynchburg, and Tri-Cities DMAs.

²⁵⁸ See *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1143 (10th Cir. 2009) (“A claim of pretext need not be supported with direct evidence, but may be based on weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s claimed legitimate, non-discriminatory reason such that a rational trier of fact could find the reason unworthy of belief.”) (internal quotation marks omitted).

²⁵⁹ *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 579 (7th Cir. 2003) (“One can reasonably infer pretext from an employer’s shifting or inconsistent explanations for the challenged employment decision.”).

²⁶⁰ See *supra* FOF ¶¶ 63, 77.

²⁶¹ See *supra* FOF ¶ 78.

120. *Third*, the carriage decisions of other major MVPDs – including Comcast’s most significant competitors – to carry MASN in the Foreclosed Areas refute Comcast’s assertions there is low demand for MASN in the Foreclosed Areas.²⁶² Approximately [REDACTED] percent of all non-Comcast, MVPD subscribers in the Foreclosed Areas receive MASN.²⁶³ There is no reason to believe that the MVPDs serving the vast majority of subscribers in these regions were all wrong to conclude that there was sufficient consumer demand to justify carrying MASN in these regions. The Media Bureau has previously concluded that similar carriage decisions by other MVPDs are strong evidence of actual and potential demand for MASN’s programming.²⁶⁴ Indeed, the Media Bureau made such findings in the *HDO* here.²⁶⁵

121. *Fourth*, Nielsen ratings confirm there is strong demand for MASN in the Harrisburg and Roanoke-Lynchburg DMAs. The record evidence establishes that Orioles games received strong ratings in those areas in 2004-2005. Comcast’s witnesses acknowledged ratings in this range were high for RSN programming.²⁶⁶ Comcast has submitted no comparable Nielsen information for its affiliated RSNs.

122. *Finally*, Comcast’s claims of low demand are, ultimately, irrelevant as a matter of law. Because this is a discrimination case, the relevant question is whether Comcast treats MASN differently from its affiliated RSNs. Comparative (rather than absolute) demand is the proper analysis. Comcast has submitted no evidence, however, of any demand for the programming of its affiliated RSNs in the Foreclosed Areas. Accordingly, there simply is no benchmark by which to compare the supposedly low demand for MASN. Under the employment-based discrimination standard urged by Comcast, these facts would conclusively prove liability. No employer could reject female applicants based on low SAT scores when it did not even ask male applicants to submit their SAT scores.

123. Comcast’s second justification for refusing to carry MASN has been to claim a high cost for MASN. This claim is closely related to the one alleging low demand, and is likewise unconvincing for similar reasons. *First*, Comcast never raised the cost of MASN as being too high in any particular area during the carriage negotiations with MASN in August 2006. Instead, Comcast sought – and obtained – an across-the-board reduction in all of MASN’s prices.²⁶⁷ Given its success in negotiating a lower price from MASN across-the-board, it is difficult to suppose that Comcast simply passed on the chance to ask for a lower price in any region where it genuinely believed that MASN’s price was too high.

²⁶² See *supra* FOF ¶ 80.

²⁶³ See *supra* FOF ¶ 80.

²⁶⁴ See *TWC Order* ¶ 34 (“the decision by four of the five largest MVPDs . . . in North Carolina to carry MASN . . . suggests the existence of actual or potential demand for MASN”).

²⁶⁵ See *HDO* ¶ 118 n.528 (concluding that carriage decisions by “DIRECTV and DISH” in “southwestern Virginia” evidence the value of MASN’s programming in that area).

²⁶⁶ See *supra* FOF ¶ 81.

²⁶⁷ See *supra* FOF ¶ 64.

124. *Second*, the price for MASN was negotiated through arm's-length transactions in the marketplace. Basic economic theory holds that "the best and most persuasive evidence of fair market value is the objective price that RSN programming yields in the marketplace."²⁶⁸ Determining a fair market value for MASN, as Dr. Singer has explained, is "particularly straightforward because *all MVPDs that carry MASN in the contested areas pay the same rate*."²⁶⁹ There is no evidence that these other MVPDs, which have every incentive to carry only valuable programming (but lack Comcast's incentive to discriminate), are each mistaken in their assessment of the value for MASN. It is therefore difficult to credit Comcast's claims that MASN's price is simply too high.

125. *Third*, two empirical studies confirm the reasonableness of MASN's rates. A PSPPE analysis shows that MASN's rate compares favorably to prices paid by Comcast to carry other RSNs. A regression analysis, which predicts the price for MASN in the Foreclosed Areas based on numerous explanatory variables, likewise confirms that the price for MASN is justified.²⁷⁰ Although Comcast questions the adequacy of these studies, its concerns are unsupported and these studies thus underscore the implausibility of Comcast's cost-based claims.

126. Comcast's third justification has been to claim a lack of bandwidth. This claim, too, is unconvincing. *First*, Comcast has admitted in this proceeding that bandwidth would not create an impediment to carrying MASN on any system with 550 MHz or more of capacity.²⁷¹ The overwhelming majority of systems in the Foreclosed Areas have at least 550 MHz of capacity.²⁷²

127. *Second*, even for systems with less than 550 MHz of capacity, a lack of bandwidth provides no legal excuse for discriminatory carriage decisions. It is a truism that all MVPDs have an incentive fully to utilize bandwidth. If that were a complete defense to an MVPD's obligations not to discriminate, then federal law could always be skirted. This is why the Commission rules are clear that cable operators can be required to carry unaffiliated networks as a remedy for discrimination,²⁷³ and that such carriage may require "the defendant . . . to *delete existing programming* from its system to accommodate carriage."²⁷⁴ Those provisions refute the suggestion that bandwidth can serve as a defense to discrimination: if a lack of bandwidth were a legitimate, non-discriminatory defense to a carriage decision, there would never be a circumstance in which a cable operator would be required "to delete existing programming . . . to accommodate carriage."

²⁶⁸ *TWC Order* ¶ 46.

²⁶⁹ MASN Ex. 238, ¶ 52 (Singer Written Test.).

²⁷⁰ MASN Ex. 238, ¶ 77 (Singer Written Test.).

²⁷¹ *See supra* FOF ¶ 88.

²⁷² *See* MASN Ex. 236, Ex. A (Unlaunched Comcast Systems Within MASN's TV Territory Designated Market Area) (Wyche Written Test.); Joint Ex. 1.

²⁷³ *See* 47 C.F.R. § 76.1302(g)(1) (authorizing "mandatory carriage")

²⁷⁴ *Id.* (emphasis added).

128. Comcast's final justification is that it relied upon its carriage agreement with MASN to refuse carriage of MASN in the Foreclosed Areas. In sum, Comcast appears to claim that it did not intend to discriminate against MASN; it simply intended to enforce the deal it had negotiated with MASN, which excluded the Foreclosed Areas. This argument is unpersuasive. *First*, it is inconsistent with Comcast's other claimed justifications – of low demand, high cost, and limited bandwidth. If Comcast just wanted to enforce the deal it had negotiated, then it would not have spent so much time and effort arguing that these other justifications precluded carriage of MASN in the Foreclosed Areas. *Second*, this argument proves too much. Even if Comcast simply wanted to enforce the Carriage Agreement when it denied MASN carriage in 2007, that does not explain why it precluded MASN from the Foreclosed Areas in 2006. If that decision was discriminatory, so too was Comcast's reliance on that decision in 2007.

D. Comcast's Contract-Based Defense Is Unpersuasive

129. Comcast's principal defense to MASN's claims of discrimination is a legal one. Comcast claims that its carriage agreement with MASN precludes MASN's ability to seek relief under the Commission's non-discrimination rules. This defense lacks merit for multiple reasons.

130. As an initial matter, Comcast claims that MASN's focus on the Carriage Agreement proves that it governs this dispute. That is incorrect. Both sides spent considerable time detailing the negotiations that gave rise to the Carriage Agreement because that agreement was, and remains, the heart of Comcast's defense. Comcast's actions during those negotiations, moreover, are evidence of its intent to discriminate against MASN. Indeed, that was the time that Comcast first decided to exclude MASN from the Foreclosed Areas – a decision Comcast has been defending ever since, including when MASN requested carriage in the Foreclosed Areas in 2007. On the merits, the Carriage Agreement is no defense.

131. *First*, a written agreement does not provide a prospective license to violate the Commission's non-discrimination rules, as prior rulings have recognized.²⁷⁵ The Carriage Agreement did not give Comcast the right to make unlawful carriage decisions.²⁷⁶ To the contrary, the agreement gives Comcast the "discretion" to carry MASN in the Foreclosed Areas, and Comcast has admitted that this discretion must be exercised consistent with federal law.²⁷⁷ As the Media Bureau had explained persuasively, "[p]arties to a contract cannot insulate

²⁷⁵ See Memorandum Opinion and Order, *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, MB Docket No. 08-214, File No. CSR-7876-P, FCC 09M-36, ¶ 3 (rel. Apr. 17, 2009).

²⁷⁶ See, e.g., *Richardson v. Sugg*, 448 F.3d 1046, 1054 (8th Cir. 2006) (explaining that "[a] number of other circuits have . . . held . . . that persons may not contract away *prospective claims* under Title VII" and reasoning that allowing a private party "to bargain away the right to pursue a prospective discrimination claim [would] frustrate[] t[he] statutory scheme" designed by Congress to remedy discrimination) (emphasis added).

²⁷⁷ See Tr. at 6919 ("Q: And another limitation on Comcast's discretion is federal regulatory law, correct? A: Yes.") (Bond Test.).

themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules.”²⁷⁸

132. *Second*, the Carriage Agreement is inapplicable under its plain terms. It contains a clause releasing the parties from certain liabilities that predated the date the Agreement was signed in August 2006. MASN’s claim, however, concerns Comcast’s refusal to carry MASN in the Foreclosed Areas in 2007. An agreement in 2006 did not give Comcast the right to break the law in 2007. Indeed, it is fundamental that release clauses are to be interpreted narrowly;²⁷⁹ exculpatory clauses in agreements bound up with the public interest (such as carriage contracts) are generally not enforced;²⁸⁰ and contractual provisions that purport to exempt a party from ongoing statutory obligations are unenforceable except under circumstances not present here.²⁸¹

133. *Third*, Comcast cannot seek refuge in the Carriage Agreement because of its unclean hands. This Commission has a responsibility to ensure that carriage negotiations are conducted with an abundance of good faith. The evidence developed in this proceeding shows that Comcast was less than candid with MASN in defining the systems that would be excluded from coverage.²⁸² Given the need for this Commission to ensure that carriage negotiations are conducted in good faith, there is no sound basis for rewarding this behavior.

IV. COMCAST’S DISCRIMINATORY CONDUCT HAS UNREASONABLY RESTRAINED MASN’S ABILITY TO COMPETE FAIRLY

134. Having determined above that Comcast has discriminated against MASN, the next element that must be established to prove a violation of Section 616(a)(3) is whether such discrimination “unreasonably restrain[s] the ability” of MASN “to compete fairly.”²⁸³ MASN

²⁷⁸ *HDO* ¶ 72.

²⁷⁹ See 8 Richard A. Lord, *Williston on Contracts* § 19:21, at 278 (4th ed. 1998) (contractual provisions “limiting future liability are strictly construed by the courts”); *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (collecting cases for the view that “an employee may validly release only those Title VII claims arising from discriminatory acts or practices which antedate the execution of the release” and that “an otherwise valid release that waives prospective Title VII rights is invalid as violative of public policy”) (internal quotation marks omitted); Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 55 (2007) (this Commission has “wide authority” to prohibit enforcement of private agreements “where . . . the public interest so requires”).

²⁸⁰ See *Williston on Contracts* § 19:22, at 287 (“[b]ecause certain agreements are affected with a public interest, exculpation clauses contained in them are not enforceable”).

²⁸¹ See *id.* § 19:26, at 316 (“[a] purported exemption from statutory liability is usually void, unless the purpose of the statute is merely to give an added remedy which is not based on any strong policy”) (footnotes omitted).

²⁸² See *supra* FOF ¶¶ 60-76.

²⁸³ 47 U.S.C. § 536(a)(3).

has met its burden to show that Comcast's refusal to carry MASN in the Foreclosed Areas has unreasonably restrained MASN's ability to compete fairly. In particular, MASN has demonstrated that, as a result of being denied carriage, it has been harmed in its ability to compete with Comcast's affiliated RSNs with respect to obtaining programming and advertising.

135. MASN introduced evidence showing that MASN competed against CSN-MA for the television rights to the Washington Redskins, that Comcast won those rights, and that the Redskins specifically noted MASN's lack of full coverage as a deficiency.²⁸⁴ Comcast does not dispute this, but instead argues that Comcast won the rights because it outbid MASN.²⁸⁵ While that may be true, expert testimony established that MASN generally would need to bid higher than Comcast's own RSNs to compensate for MASN's relative lack of coverage.²⁸⁶ Thus, the fact that Comcast outbid MASN does not overcome the evidence showing that MASN's lack of coverage put it at a competitive disadvantage in bidding for those rights in the first instance.

136. MASN also introduced evidence showing that its coverage gaps caused MASN to lose business opportunities from two significant advertisers: [REDACTED].²⁸⁷ Advertising is one of two principal sources of revenue for an RSN (the other being license fees), and the loss of such revenues is significant not merely because it reduces MASN's profits, but also because it impairs MASN's ability to compete for additional programming to enhance its network. With lower advertising revenues, MASN will have less ability to bid for expensive sports programming as compared to MASN's chief rivals, CSN-MA and CSN-Philly. Although Comcast criticizes MASN's evidentiary showing, it does not offer any contrary proof or provide a basis to doubt the veracity of MASN's witnesses.²⁸⁸

137. Comcast argues that these injuries are not sufficient to show "unfair harm" because MASN remains profitable. Comcast has argued in this litigation that, in applying the compete-fairly prong, MASN must show "concrete adverse effects of a significant nature." It is not clear what Comcast means by this standard, but to the extent that Comcast suggests that an

²⁸⁴ See *supra* FOF ¶ 92.

²⁸⁵ Comcast PRFOF ¶ 63.

²⁸⁶ See *supra* FOF ¶ 92.

²⁸⁷ See MASN Ex. 235, ¶ 42 (Cuddihy Written Test.).

²⁸⁸ See Comcast PFOF ¶ 187. Comcast also argues that MASN's injury is "self-inflicted" because MASN "allowed its advertising sales staff to represent to advertisers that the network had '100%' coverage on Comcast's systems in southwestern Virginia in January 2007, during the first phase of the launch, despite the fact that no systems in southwestern Virginia were scheduled to launch MASN in the first place, and the systems at issue were ones that MASN believed were excluded from mandatory carriage under the 2006 Settlement Agreement in any event." Comcast PRFOF ¶ 62. But this misses the point: the dispositive fact is that the coverage gaps created by Comcast's carriage decision impair MASN's ability to secure and maintain advertising deals, thus depriving MASN of important revenue. Furthermore, there is no evidence in the record to support the allegation that MASN's sales staff misrepresented the scope of carriage.

unaffiliated network must show that it would suffer catastrophic losses that would imperil the ability of the network to compete, Comcast's reading of the statute is not supported by the text, history, or purposes of the Cable Act.

138. The non-discrimination principle in the Cable Act and the Commission's rules prohibits affiliation-based discrimination that "restrain[s]" a network's "ability to compete fairly," not that eliminates a network's ability to compete *at all*. Preserving fair competition is obviously distinct from preserving competition at all: Comcast's construction of those terms reads the "fair[]" competition language out of the statute. Comcast's economic expert concedes that point: he testified that the *fair* competition "standard" was not what he "applied."²⁸⁹ If Congress or this Commission had intended to limit the bar on discrimination to instances in which an unaffiliated network would be put out of business, either could have said so directly.²⁹⁰

139. Furthermore, Congress's choice of the word "restrain" – rather than, for example, "foreclose" or "impair" – suggests Congress's expectation that conduct that falls short of completely foreclosing fair competition would be proscribed. And, in all events, the object of injury in the statute and the Commission's regulations is the competitor (namely, the "unaffiliated video programming vendor"²⁹¹), not competition in the abstract. Much of Comcast's expert testimony regarding injury applies standards developed in the antitrust context to measure harm to competition, not harm to competitors.²⁹² Assessing "harm to a competitor," Comcast's expert acknowledged, "would be a different analysis" than he conducted.²⁹³ For that reason, that testimony is of little relevance to this proceeding.

140. Finally, a strict interpretation of the compete-fairly prong would have negative policy consequences by allowing vertically integrated cable operators to engage in discriminatory conduct that stops just short of bankrupting or inflicting catastrophic losses on an unaffiliated network. There is no reason to believe that Congress would have intended such a result, which would tilt the competitive playing field permanently in favor of affiliated networks contrary to Congress's stated aim of preventing affiliation-based discrimination.²⁹⁴ Nor does such a result make sense as a matter of regulatory policy.

²⁸⁹ Tr. at 7216-17 (Orszag Test.).

²⁹⁰ See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (courts should "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply").

²⁹¹ E.g., 47 U.S.C. § 536(a)(3).

²⁹² See Tr. at 7213-16 (Orszag Test.).

²⁹³ Tr. at 7214 (Orszag Test.).

²⁹⁴ See generally Tr. at 6370-71 (discussing dangers of a "Death by 100 Cuts" view under which vertically integrated cable companies could engage in discriminatory conduct so long as they did not inflict catastrophic injury on an unaffiliated network) (Singer Test.).

V. COMCAST’S THRESHOLD LEGAL DEFENSES ARE UNCONVINCING

141. Comcast has also argued that MASN’s Carriage Complaint is time-barred. The Presiding Judge does not agree. This case is about Comcast’s unreasonable refusal to carry MASN in the Foreclosed Areas. From the time MASN discovered that Comcast would not carry MASN in the Foreclosed Areas until the filing of its Complaint, MASN sought to reach a negotiated agreement with Comcast.²⁹⁵

142. The negotiations between MASN and Comcast over carriage in the Foreclosed Areas, which occurred under a standstill agreement reached in April 2007, appeared to reach a firm impasse in March 2008. At that time, MASN sent a notice letter to Comcast pursuant to 47 C.F.R. § 76.1302(a) and (b).²⁹⁶ MASN explained that, “[g]iven that Comcast carries affiliated RSNs in these geographic regions, that Comcast has offered no legitimate business justification for its differential treatment of MASN and its affiliated RSNs, and that Comcast’s affiliates have historically carried Orioles programming in these areas, Comcast’s refusal to carry MASN is in direct violation of 47 C.F.R. § 76.1301(c).”²⁹⁷

143. MASN filed its Complaint on July 1, 2008, well within one year of MASN “notif[ying] [Comcast] that it intend[ed] to file a complaint with the Commission” based on Comcast’s unreasonable refusal to carry MASN in the Foreclosed Areas.²⁹⁸

144. Under the plain text of the Commission’s rules, MASN’s Complaint was thus timely filed. The Bureau has already determined as much.²⁹⁹ The Presiding Judge finds that conclusion well-supported in law and fact. Comcast’s argument that the statute of limitations should be triggered by the signing of the Carriage Agreement is unpersuasive: MASN here does not seek to challenge any provision of the Carriage Agreement.³⁰⁰

145. Comcast has also argued that *res judicata* bars MASN’s Complaint. For the same reasons the Presiding Judge rejects Comcast’s reliance on the Release, *res judicata* is no bar.³⁰¹

²⁹⁵ See *supra* FOF ¶ 24; Tr. at 6955 (“Q: And then in 2007 when MASN determined that it was not being carried in all the markets it thought it was being carried on, it requested Comcast to carry it on those additional markets, the disputed markets, correct? A: Yes.”) (Bond Test.).

²⁹⁶ See MASN Ex. 66.

²⁹⁷ *Id.* at 1.

²⁹⁸ 47 C.F.R. § 76.1302(f)(3).

²⁹⁹ See *HDO* ¶¶ 102-105.

³⁰⁰ There is thus no basis for concluding that the trigger in 47 C.F.R. § 76.1302(f)(1) applies.

³⁰¹ See *supra* Conclusions of Law ¶ 131 (“COL”).

146. MASN's Complaint does not involve the same "common nucleus of operative facts" – a requirement of *res judicata*³⁰² – as does the 2005 Carriage Complaint because MASN's current Complaint is based upon Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007.³⁰³ The Media Bureau has already reached this result.³⁰⁴ The Presiding Judge finds that conclusion well-supported in law and fact.

147. Independently, the evidence of Comcast's misconduct in procuring the prior settlement agreement is sufficient to defeat a claim of *res judicata*.³⁰⁵

VI. THE APPROPRIATE REMEDY IS MANDATORY CARRIAGE OF MASN ON THE TERMS PROPOSED BY MASN, AS WELL AS PAST DAMAGES TO MAKE MASN WHOLE

148. In light of the above findings of fact and conclusions of law, a remedy of mandatory carriage on the terms proposed by MASN (and already accepted by Comcast outside the Foreclosed Areas) is appropriate. That remedy is necessary to put MASN in the position it would be in but for Comcast's discrimination, to advance the public interest, and to address the evidence of Comcast's discriminatory carriage practices brought to light by this proceeding.

149. Comcast has submitted no evidence in this proceeding establishing that the terms and conditions offered by MASN are commercially unreasonable. MASN, in contrast, has set forth substantial evidence that the terms and conditions for carriage it has proposed reflect fair market value. That is confirmed by two expert economic analyses as well as by the carriage decisions of other major MVPDs in the Foreclosed Areas. Comcast has submitted no reliable evidence undermining MASN's extensive showing.

150. Although it has submitted no evidence challenging the reasonableness of MASN's evidence, Comcast suggests in its proposed conclusions of law that carriage of MASN should be limited to a sports-tier. The Presiding Judge rejects this proposed remedy. This would exacerbate, not remedy, discrimination. None of Comcast's affiliated RSNs across MASN's footprint, including in the Foreclosed Areas, is carried on a sports tier.³⁰⁶ A bureau of the

³⁰² *E.g.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, *Applications of Mid Atlantic Network, Inc. and Centennial Licensing II, L.L.C.*, 23 FCC Rcd 7582, ¶ 8 (MB 2008).

³⁰³ *See, e.g.*, Carriage Complaint ¶ 84 (alleging that the "release clauses of the Term Sheet" are no defense because "[t]he core of this complaint seeks to hold Comcast liable for its conduct and its program carriage violations *since* the Term Sheet – namely, Comcast's unreasonable and discriminatory refusal to carry MASN on those unlaunched systems").

³⁰⁴ *See HDO* ¶ 107 ("We conclude that the MASN complaint is not barred by *res judicata*.").

³⁰⁵ *See McCarty v. First of Ga. Ins. Co.*, 713 F.2d 609, 612 (10th Cir. 1983); *United States v. De Lucia*, 256 F.2d 487, 491 (7th Cir. 1958); *Riggs v. Loweree*, 56 A.2d 152, 156 (Md. 1947).

³⁰⁶ *See, e.g.*, MASN Ex. 238, ¶ 7 (Singer Written Test.).

Commission, moreover, has concluded that sports-tier carriage can be ruinous for an RSN.³⁰⁷ It would defy basic remedial principles, not to mention common sense, to accept a remedy for discrimination that would instead continue Comcast's disparate and discriminatory treatment of MASN. The Presiding Judge declines to do so.³⁰⁸

151. Finally, mandatory carriage cannot alone remedy Comcast's discriminatory refusal to carry MASN since 2007. The Presiding Judge accordingly orders Comcast to pay MASN past damages³⁰⁹ of [REDACTED] for the period until May 2009, and [REDACTED] for each month following May 2009, in addition to pre-judgment and post-judgment interest on these amounts.³¹⁰ Alternatively, the Presiding Judge recommends that the Commission institute a separate proceeding to determine damages promptly after the entry of a final order requiring carriage of MASN by Comcast.

³⁰⁷ See, e.g., *TWC Order* ¶¶ 31, 40.

³⁰⁸ Comcast's First Amendment arguments are unpersuasive. Courts have rejected First Amendment challenges to similar provisions of the Cable Act designed to constrain anticompetitive conduct. See *Time Warner Entm't Co. v. United States*, 211 F.3d 1313, 1316-18 (D.C. Cir. 2000); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). Furthermore, the constitutionality of the Cable Act is an issue for courts, not this Commission. See Second Report and Order, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, ¶ 55 (1993), *aff'd in part, rev'd in part*, *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

³⁰⁹ See 47 C.F.R. § 76.1302(g)(2); 47 U.S.C. § 548(e)(1); see also Memorandum Opinion and Order on Reconsideration of First Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 1902, ¶¶ 16-18 (1994) (holding that similar language in the program-access statute and regulations allows for the award of damages).

³¹⁰ Using the methodology supported by the record-evidence, see MASN Ex. 238, ¶¶ 79, 103, these amounts are based on the following calculation: [REDACTED] subscribers (the number of subscribers in the Foreclosed Areas based on available evidence prior to the submission of Joint Exhibit 1 in June 2009) * [REDACTED] (MASN's per subscriber rate for the relevant zone) * 25 (the number of months from April 2007 to May 2009) = [REDACTED]. For each month subsequent to May 2009, damages are determined from the following calculation: [REDACTED] (the revised subscriber total set forth in Joint Exhibit 1) * [REDACTED] = [REDACTED]. Comcast did not object to this methodology, nor did it submit a contrary one.

ORDERING CLAUSES

152. Accordingly, IT IS HEREBY ORDERED that the MASN Carriage Complaint against Comcast is GRANTED;

153. IT IS FURTHER ORDERED that Comcast shall provide MASN carriage on all cable systems within MASN's television territory in accordance with the terms and conditions set forth in MASN Exhibit 90 within 30 days of adoption of this Recommended Decision by the Commission;

154. IT IS FURTHER ORDERED that, as a remedy for Comcast's discrimination, Comcast shall pay MASN damages of [REDACTED] plus pre-judgment and post-judgment interest, for its refusal to carry MASN in the Foreclosed Areas from April 2007 to May 2009; subsequent damages will be calculated using the methodology described in this order.

FEDERAL COMMUNICATIONS COMMISSION³¹¹

Richard L. Sippel
Chief Administrative Law Judge

³¹¹ The parties may file with the Commission written exceptions to this Recommended Decision as provided in 47 C.F.R. §§ 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C.F.R. § 1.282.

REDACTED, PUBLIC VERSION

CERTIFICATE OF SERVICE

I, Kelly P. Dunbar, hereby certify that, on July 20, 2009, copies of the foregoing document were served via electronic mail on the following:

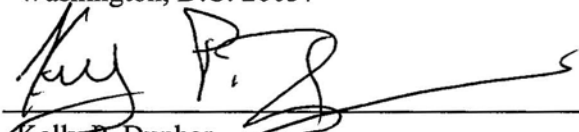
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